

THE NORTHERN IRELAND LAW REPORTS

CONTAINING
REPORTS OF CASES ARGUED AND DETERMINED

IN
THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN
THE COURT OF APPEAL

IN
NORTHERN IRELAND

EDITED BY
T. HENRY MAXWELL,
ONE OF HIS MAJESTY'S COUNSEL

1927.

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WALSH AND OTHERS v. WIGHTMAN AND
ANOTHER (1).

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April 26. 27
June 30

Lease—Forfeiture—Breach of Covenant—Notice—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict., c. 41), s. 14 (1)—Rule against Perpetuities—Repugnancy.

By an indenture of Fee Farm Grant dated 14th July, 1880, certain lands were conveyed by the trustees of the S. Estate to trustees nominated by and on behalf of the Presbyterian Congregation of S. in connexion with the General Assembly of the Presbyterian Church in Ireland.

The grant contained covenants for the building of a manse on the land granted, the manse to be for the Presbyterian congregation of S., and numerous provisions regulating the use of the building as a manse only, and only for the benefit of the S. congregation, while it continued to exist as such. It was further provided that if the congregation should cease to be in connexion with the General Assembly, or should become united with any other congregation or cease to exist as a separate and independent congregation the grant should become absolutely null and void, and a power of re-entry was reserved to the grantor.

The plaintiffs served upon the defendants a notice demanding possession of the premises within ten days on the ground that the grant had become null and void by reason of the union of the congregations of C. and S.

The trial judge found as a fact that the Committee on Union of the General Assembly had power to effect a union between the congregations of C. and S., and that this had been carried out in accordance with the terms of their report.

On case stated by Moore C.J. in proceedings by way of Civil Bill for recovery of possession of the premises:—

Held, by the Court of Appeal (Andrews and Best L.JJ.) that a sufficient notice under s. 14 (1) of the Conveyancing and Law of Property Act, 1881, was a condition precedent to enforcing the forfeiture, and that the notice given was not sufficient, and therefore the proceedings were not maintainable.

Held also that the union of the congregations of C. and S., or the congregation of S. having ceased to be separate and independent, constituted the "event" contemplated by the forfeiture condition in the deed.

Held further, following the judgment of Palles C.B. in *The Attorney-General v. Cummins* ([1906] 1 I.R. 406) that the forfeiture clause was not void as infringing the rule against perpetuities.

And *Held* that there was no repugnancy between the grant of the lands and the avoidance of that grant when the manse ceased to be used as a manse *In re Macleay* (L.R. 20 Eq. 186), and *In re Lunham's Estate* (I.R. 5 Eq. 170) distinguished.

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CASE STATED by Moore C.J. for the opinion of His Majesty's Court of Appeal in Northern Ireland at the County of Down Summer Assizes, 1925, on an appeal from the County Court Judge of Down.

This case came on before me at Downpatrick Summer Assizes, 1925, as an Appeal from a decision of the County Court Judge of Down, who granted the plaintiffs a decree in ejectment. At the request of the parties I adjourned the Appeal for hearing to Belfast. The appeal was taken by the defendant, John Mains Wightman—the other defendant, the Rev. John Stewart, did not appeal.

The appeal came on for hearing before me in Belfast on Friday, January 15th, 1926. *Monroe K.C.* and *MacDermott* appeared for the plaintiffs. *The Attorney-General*, *Megaw K.C.* and *Black* for the defendants.

During the adjournment the original defendant Wightman died, and I amended the Civil Bill by adding the names of his Executors, the Revd. Samuel Mayne Shaw and William Henry Shaw as defendants.

I refer to the original Civil Bill which is to be taken as part of this case. Plaintiffs are Trustees of the Seaforde Estate and entitled to all the estate of the grantor under a Fee Farm Grant dated 14th July, 1880. The defendants represent all the estate of the grantees under the said grant.

The grant contains covenants for the building of a manse on the land granted, the manse to be for the Presbyterian congregation of Seaforde, and numerous provisions regulating the use of the building as a manse only, any only for the benefit of the Seaforde congregation while it continued to exist as such. I only purport to give the tenour of this indenture in the foregoing, but I refer to it and incorporate it in this case.

I found as a fact that the Committee on Union of the General Assembly had power to effect a union between the congregations of Clough and Seaforde, and that the terms of their report dated 27th June, 1923, to which I refer and incorporate in this case have been carried out.

I also find that there were no specific provisions in the code of the Presbyterian Church with regard to union of congregations at the date of the grant of 1880.

The Committee on Union was first established by the General Assembly about two years after that date and was given Assembly powers.

The Revd. John Stewart, Minister of Seaforde, retired from the Ministry in 1923, and is in occupation of the manse in question. Revd. Mr. Orr is now minister of both.

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The plaintiffs have claimed the manse, alleging that in the events which have happened they are entitled to possession under the terms of the grant.

The Attorney-General took as preliminary objection (which was not taken in the court below) that no notice had been served under Section 14 of the Conveyancing and Law of Property Act, 1881.

It was argued for the plaintiffs that no notice was necessary, and that if such notice were necessary the notice hereinafter referred to was sufficient.

I held that the notice of 26th May, 1924, was sufficient compliance, but that plaintiffs were restricted to the only breach specified in the notice, viz. :—"The Union." I refer to the notice.

The plaintiffs having closed their case, the Attorney-General argued that the union which had taken place was not a union contemplated by the grant. Secondly, that the restrictions in the grant were contrary to the rule against perpetuities and cited *Re Hollis' Hospital* (1), *In re Ashforth* (2), *In re Da Costa* (3). Thirdly that such restrictions were void as repugnant to the estate in fee granted by the deed, citing *In re Macleay* (4), *Lunham's Estate* (5).

As I was informed that whatever my decision might be the unsuccessful party would require a case stated, I agreed at the request of the defendants to state a case, and did not call upon Monroe to reply.

The question for the court is whether in all the circumstances hereinbefore set out the plaintiffs are entitled to recover possession of the premises granted by the indenture of 14th July, 1880.

The Attorney-General (A. B. Babington, K.C.), Megaw K.C., and Black for the defendants :—There was no union of these congregations in fact. The question is whether the so-called union comes within the forfeiture clauses in the deed. All the questions of law are left open by the

(1) [1899] 2 Ch. 540

(4) L.R. 20 Eq. 188

(2) [1905] 1 Ch. 535

(5) L.R. 5 Eq. 170

3) [1912] 1 Ch. 337

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Chief Justice. The question as to notice is a pure question of law, the point being whether section 14 of the Conveyancing Act, 1881, has been complied with.

The two congregations were joined together for certain purposes and to a certain extent only. The notice of the 26th May, 1924, was never designed or intended to be a notice under section 14 of the Conveyancing Act, 1881. The plaintiffs could have got relief by applying to the Court if a union had been effected. The effect of section 14 of the Conveyancing Act, 1881 is to give relief from forfeiture where the breach is capable of remedy.

The document on which the alleged union is based is the report of the Committee on Union, which shows that the union was not complete, and that the two charges were to continue as distinct congregations. The net question is whether placing Seaforde and Clough under one minister constituted such a union of the two congregations as would cause forfeiture. What has happened is simply the giving of two congregations into the charge of one minister. We submit that neither in fact nor in law has there been such a union of the two congregations as to bring about a forfeiture under section 14 of the Conveyancing Act, 1881. The two congregations are separate and independent except for the purpose of electing a minister. Forfeiture clauses must be construed strictly.

We submit that the restrictions in the grant offend against the rule against perpetuities. We rely on *In re the Trustees of Hollis' Hospital* and *Hague's Contract* (1). *In re Ashforth, Sibley v. Ashforth* (2), *In re Da Costa, Clarke v. Church of England Collegiate School of St. Peter* (3), *London and South Western Railway Company v. Gomm* (4). The Court of Appeal in Ireland accepted the decision in *London and South Western Railway v. Gomm* (4). Sir S. Walker said in *In re Tyrrell's Estate* (5) at p. 296, referring to the case of *London and South Western Railway v. Gomm* (4), "In my opinion it is impossible to distinguish that case from the present in principle."

We submit that the condition is invalid on the ground of repugnancy, and we rely on *In re Macleay* (6), and *In re Lunham's Estate* (7). As to the question of the notice

(1) [1890] 2 Ch. 540

(2) [1905] 1 Ch. 535

(3) [1912] 1 Ch. 337

(4) 20 Ch. D. 562

(5) [1907] 1 I.R. 292

(6) L.R. 20 Eq. 186, 188

(7) I.R. 5 Eq. 170

necessary under section 14 (1) of the Conveyancing Act, 1881, the effect of this section is correctly stated by Buckmaster C. in *Fox v. Jolly* (1) at p. 8 as follows :—" The conditions precedent which the lessor must perform are these. He must serve a notice, and that notice must specify the breach of covenant which is the subject of complaint. That is, he must point out the covenant which he says is broken, and he must specify the breach of which he complains. He must also call upon the lessee to remedy the breach, and if he requires compensation in money he must ask for it. After this has been done a reasonable time must elapse in which the lessee has the opportunity of complying with the requirements of the notice. It is only when this has been done, when the time has expired, and the work is incomplete that the landlord can proceed to the assertion of his rights." In the present case none of these conditions has been complied with. There has been an attempt to put in a repugnant clause in reference to an estate in fee simple, such a clause is void and unenforceable.

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Monroe K.C. and *MacDermott* for the plaintiffs :—

The word " union " does not imply any intermingling, nor does it imply that the two congregations were joined together for all purposes. The lease contemplated the three alternatives of absorption, amalgamation, or union. The grant is at an end by the happening of an event which was contemplated by the lease, the effect being to determine the lessees' interest. The breach could not be remedied by the lessees. The facts in *The Attorney-General v. Pyle* (2) closely resemble those in the present case. In that case it was held that freehold estate devised to a charity, so long as it continued to be endowed with charity was only given quosque, and when it ceased as a gift of real estate it should revert for the benefit of the heir of testator. The rule against perpetuities was never applied to common law conditions subsequent, until the decision in *In re the Trustees of Hollis' Hospital and Hagne's Contract* (3), which we submit was wrongly decided. The editor of *Challis's Real Property* (third ed., p. 208) quoting from the third report of the Real Property Commissioners,

(1) [1916] 1 A.C. 1

(2) 1 Atk. 435

(3) [1899] 2 Ch. 510

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says "The ancient common law did not restrain the creation of future interests to a given period. The time allowed for re-entries under conditions broken, and for grants of rent-charges or other incorporeal hereditaments, commencing in futuro, and for creating the *interesse termini*, was indefinite, however courts of justice may at present be disposed to consider them within that policy of law which restrains perpetuities. Sir Edward Coke expressly says, 'If I enfeoff another of an acre of ground, upon condition that if mine heir shall pay the feoffee, etc., twenty shillings, he and his heirs shall enter, this condition is good.' We know of no bounds originally fixed by the common law within which interests of these kinds were restrained; and it is a mistake to suppose that at the common law, properly so called, there was any rule against perpetuities." We rely on the *Attorney-General v. Cummins* (1), where Palles C.B. said at p. 408, "thus, the only real question is whether the estate of the Crown is defeated by the rule against perpetuities. The grant in question operated at common law. It did not take effect under the Statute of Uses, and the modern rule against perpetuities never applied to common law conveyances. It is impossible that it could have applied, as it had its origin in the Statute of Uses, as is matter of elementary knowledge, and the subject matter of that statute did not include conveyances other than those to uses."

In *In the Trustees of Hollis' Hospital and Hague's Contract* (2) Byrne J. practically took on himself to regulate the common law, he actually legislated. We submit that he had no right to extend the doctrine to common law conveyances, and that his whole judgment is mere obiter dictum. In *In re Da Costa, Clarke v. Church of England Collegiate School of St. Peter* (3), Eve J. held that he was dealing with a common law condition subsequent. We submit that he was wrong in so holding, and that he was really dealing with an executory devise. This error deprives his decision of any authority.

Williams in his work on Vendors and Purchasers (third edition) at p. 636 says, "As to conditions of entry limited

(1) [1906] 1 I.R. 406
(2) [1899] 2 Ch. 540

(3) [1912] 1 Ch. 337

on gifts of land at common law to the donor and his heirs, they were in use and were considered to be perfectly valid long before the rule against perpetuities was heard of, and the opinion of the Real Property Commissioners was that, although these conditions came within the policy of the modern rule against perpetuities, their validity was not affected by that rule as it then existed." Byrne J. in *In re Hollis' Hospital and Hague's Contract* (1) simply adopted the view maintained in Lewis on Perpetuities, 616, and we submit that as stated in Williams on Vendor and Purchaser (third edition) p. 637, "on such a question the opinion of the Real Property Commissioners is of greater weight than that of Mr. Lewis. The editors of Jarman on Wills (6th edition) referring to the rule against perpetuities state at p. 375, "The excellent judgment of Pales C.B. in *Attorney-General v. Cummins* (2) stands out as a valuable contribution to the learning on this branch of law."

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As to the position under section 14 of the Conveyancing Act, 1881, that section deals with the kinds of breach for which compensation may be claimed, and requires the lessee to remedy the breach. The matter of union was entirely out of the control of the lessee, and could not be remedied by him. We submit that the section aims at something done or omitted by the lessee in contradistinction to the happening of an event. The Conveyancing Act, 1892, s. 2 (1) supports the view that the statute was looking to some delinquency on the part of the grantee or lessee. A condition should be interpreted as involving some fetter or restraint on the actions of the grantee or lessee. An outside event has happened which is beyond the control of the lessee, and we submit that section 14 could not apply to such a case.

Lock v. Pearce (3) is an authority for the proposition that a landlord can waive his right to money compensation. In the cases referred to on behalf of the plaintiff on repugnancy an attempt was made to impose a fetter on alienation.

As to the application of the rule against perpetuities, to a common law condition subsequent, there is a conflict between *In re Hollis' Hospital and Hague's Contract* (1),

(1) [1899] 2 Ch. 540

(3) [1893] 2 Ch 271

(2) [1906] 1 I.R. 456

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and *Attorney-General v. Cummins* (1). We submit that the latter case should be followed and that common law conditions are not subject to the rule. [They also referred to *Whiby v. Mitchell* (2).]

Megaw K.C. (in reply)—It never was intended that such a union as this should divest the property. It is only on account of a breach of condition that plaintiff could succeed. It does not matter by whom the breach is remedied. The lessee need not necessarily remedy it himself. That, we submit, is the reasonable and proper construction of s. 14 of the Conveyancing Act, 1881. We contend that there has been no union, as each congregation retains its separate identity. We rely on *In re Ashforth, Sibley v. Ashforth* (3), which decided that the rule against perpetuities applied to legal contingent remainders as well as to equitable limitations.

Cur. adv. vult.

June 30

ANDREWS L.J.—The facts of this case are fully set out in the Case Stated by the Lord Chief Justice and need not be repeated here.

Four questions arise for our determination:—

(1) Whether the provisions of Section 14 (1) of the Conveyancing Act, 1881, apply to the present case, necessitating the service of the notice prescribed by that section before the right of re-entry or forfeiture, under the Fee Farm Grant of 14th July, 1880, can be enforced by action?

(2) Assuming the section to apply, was the notice of 26th May, 1924, a sufficient compliance with the requirements of the section?

(3) Whether the circumstances which have happened constitute an event contemplated by the forfeiture condition? and

(4) Was the condition relied upon as creating a forfeiture valid, or was it void:—(a) as infringing the rule against perpetuities, or (b) as being repugnant to the estate granted by the deed?

On the first of these questions Mr. Monroe, who appeared for the plaintiffs in support of the ejectment, contended that the section only applied in the case of a breach of covenant or condition in the lease; that there has been

no breach of anything by the lessees or by any one else; and that all that has occurred is that an event has happened which was contemplated by the lease, in consequence of which the lessees' interest in the lands has been determined by the express terms of the lease. The argument is ingenious, but, in my opinion, it cannot succeed.

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I approach the consideration of the question from the standpoint that the policy of the law in modern times has been against the enforcement of forfeitures when the breach relied upon can be remedied, pecuniary compensation awarded, and adequate undertaking given to prevent a recurrence of the breach. Obviously the lessee may be deprived of his right to relief if he receives no notice specifying the breach relied upon; for without such notice he may reasonably assume that it is the lessor's intention to waive the breach, and may refrain from proceeding to effect a remedy.

These were, as I conceive, some of the reasons which underlay the policy of the Legislature when enacting section 14 of the Conveyancing Act, and, in my opinion, they all apply to the case now under consideration.

Notwithstanding the strong words of the proviso which declares that in the event of certain breaches of covenant or the happening of certain events the lease should immediately cease and become and be thenceforth absolutely null and void, it is, I think, clear that the mere happening of any such event does not ipso facto render the lease void; it is merely voidable at the option of the lessor. Sir Montague E. Smith, in delivering the judgment of the Privy Council in *Davenport v. The Queen* (1) said:—"In a long series of decisions the courts have construed clauses of forfeiture in leases declaring in terms, however clear and strong, that they shall be void on breach of conditions by the lessees, to mean that they are voidable only at the option of the lessors." The same view of the law is expressed by Lord Buckmaster in the more recent case of *Quesnel Forks Gold Mining Co., Ltd., v. Ward & Others* (2), when he said, "In their lordships' opinion this clause, though strongly expressed, is nothing but a condition of forfeiture of which the lessor is not bound to take advant-

(1) 3 A.C. 115 at p. 128

(2) [1920] A.C. 222 at p. 227

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age, and they think that the learned judges of the Court of Appeal were quite right in the expression of their opinion that in the circumstances of this case no act was done by the Crown to establish the forfeiture, and that, until such an act took place, the term was not ended."

Without, therefore, the doing of some act such as the serving of a notice declaring forfeiture the term is not ended and the forfeiture is not complete. Until then the lease is only voidable, not void; and the lessee is not in a position to say if the alleged breach will be relied upon by the lessor as working a forfeiture. The grant in the present case contains covenants by the grantees to build a manse; to keep it in good repair, and not to use it for any purpose other than as a manse or residence for the minister of the Presbyterian congregation of Seaforde. Then follows a condition of the letting that if the grantees be guilty of a breach of any such covenant, or if the congregation cease to exist, or if it should become united with any other congregation or cease to exist as a separate and independent congregation the grant should cease and become and be thenceforth absolutely null and void.

If the congregation has become united with another, or has ceased to exist as a separate and independent congregation, there has clearly been a breach of a condition in the grant. It is none the less a breach of condition because it is the happening of what Mr. Monroe calls "an event" which constitutes the breach. It is further argued that the condition has not been broken by the grantees, and that the section only applies to breaches by them. In my opinion, the answer to this contention is that apparently both the grantees, who are trustees, and the congregation of Seaforde, who are the *cestuis que trustent*, were privy and consenting parties to the union which was effected by the General Assembly with the congregation of Clough. At any rate, there is no evidence of their dissent or disapproval; and, in my opinion, if a condition of the grant was broken the onus was upon the grantees to show that they had no measure of responsibility for the breach. For these reasons I hold that the section applies and that the due service of a notice thereunder was a condition precedent to the enforcing of the right of entry by action or otherwise.

In these circumstances the second question arises, namely, whether the notice of 26th May, 1924, was a sufficient compliance with the requirements of the section. Obviously it was not intended as a notice under the section, as it is not in the usual form and it makes no reference to the section. It was merely intended to be a demand for possession of the premises within ten days on the ground that the grant had become null and void by reason of the union of the congregations of Seaforde and Clough. It did not require the breach of condition to be remedied by dissolution of the union, a matter which, though not within the control of the grantees, might to some extent at least have been influenced by them if they considered that the retention of their interest in this property was of paramount importance to the other considerations which had induced the union. The notice did not contain any reference to the congregation having "ceased to exist as a separate and independent congregation," though, as hereafter appears, I regard this as an important assignment of breach. Again, it did not demand compensation in money for the breach, but this is not a fatal defect—*Lock v. Pearce* (1). There is, however, another matter in respect of which the notice was, in my opinion, defective. It demanded possession of the premises within ten days, a period obviously insufficient to enable the defendants to have the breach remedied if they considered it expedient in the interests of the congregation to do so. No doubt this point loses some of its weight by reason of the delay of some months which elapsed after the expiration of the notice and before the institution of proceedings; but delay as to which the lessees have no foreknowledge or assurance does not provide the same opportunity for remedying a breach, as a period which is certain and definite. The law, as to the necessity for reasonable time after notice, was fully dealt with by Lord Russell C.J. in *Horsely Estate, Ltd., v. Steiger* (2).

My opinion upon this latter question is sufficient to determine the present proceedings against the plaintiffs; but the case was so fully argued that I feel it my duty to express my views—mere dicta though they may be—upon

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(1) [1893] 2 Ch. 271

(2) [1899] 2 Q B. 79 p. 91, 92

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the other issues raised, in the hope that they may be of some guidance to the parties in the settlement of their differences.

I am clearly of opinion that the circumstances which have happened constitute "an event" within the forfeiture clause. Under that clause the grant becomes null and void if at any time the congregation shall cease to exist or shall become united with any other congregation or cease to exist as a separate and independent congregation. In my opinion this clause contemplates the three cases of total extinction of the congregation, total union, and such a partial union as makes it impossible to say that it has any longer an existence as a congregation separate from and independent of another congregation. There is much to be said for the view that, as each of the congregations of Seaforde and Clough retains, under the so-called "Terms of Union," its separate identity with its own Kirk Session and Committee and other independent features, the union was not complete; but it is quite impossible to say since the adoption of the Report of the Committee on Union that the congregation of Seaforde continues to exist as a separate and independent congregation. An event, therefore, has happened which is in my opinion within the scope and contemplation of the forfeiture clause.

I now turn to the question which from the purely legal standpoint is the most interesting issue in the case—whether the forfeiture clause is void as infringing the rule against perpetuities? The clause is admittedly a condition subsequent, and the net question to be determined is whether the rule against perpetuities applies to conditions subsequent in the same manner as it applies to executory limitations. The Attorney General's case in support of the affirmative of that issue is based largely on the decision of Byrne J. in *In the Trustees of Hollis' Hospital and Hague's Contract* (1), in which it was held that a reverter clause, which was in terms and form a true common law condition, was void as being obnoxious to the rule against perpetuities. The decision loses some weight, however, when it is noted that the learned Judge stated that he regarded the point as one of obscurity and difficulty; and,

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as the adverse claimant under the reverter clause was not a party to and refused to be bound by the decision, he declined to force the title on an unwilling purchaser. In *In re Ashforth—Sibley v. Ashforth* (1), Farwell J. expressed the view that the rule against perpetuities applies to legal contingent remainders as well as to equitable limitations. Mr. Monroe endeavours to detract from the authoritative character of this decision by stating that the learned Judge erroneously held that the words of the impugned devise created a legal contingent remainder, whereas the limitations were in fact equitable. In my opinion the decision cannot be explained away on this ground. It was admitted, and in my opinion rightly admitted, in the argument of the case, that the limitation of the estate tail, the validity of which was under consideration, was a legal contingent remainder; and the only distinction which can be drawn between that case and the present is that in *In re Ashforth—Sibley v. Ashforth* (1) the court had under consideration a legal contingent remainder created by will, whereas in the present case we are concerned with a common law condition subsequent contained in a deed. The question of the application of the rule against perpetuities to common law conditions subsequent came directly under the notice of Eve J. in *In re Da Costa, Clarke v. Church of England Collegiate School of St. Peter* (2), who held that as the gift to the charity was an absolute one with an added common law condition subsequent, determining the interest of the charity in certain circumstances, unlimited in point of time, this latter clause was, on the authority of *The Hollis Hospital Case* (3), void as infringing and being obnoxious to the rule against perpetuities.

Other cases could be referred to containing dicta in support of the defendant's contention as to the invalidity of the reverter clause on the ground that it infringes the rule against perpetuities, but none of the cases which I have cited or to which I have referred appeals to me with the same weight or authority as does the decision of the Irish King's Bench Division, consisting of Palles C.B., Andrews, and Murphy JJ. in *Attorney-General v. Cummins*

(1) [1905] 1 Ch. 535

(2) [1912] 1 Ch. 337

(3) [1899] 2 Ch. 540, 548

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and Others (1). This case, though decided in 1895, was not reported till the year 1906, when it appeared at p 406 as an addendum to the report of *Switzer & Co., Ltd., v. Rochford* (2). It was, accordingly, not cited to Byrne J. in *The Hollis' Hospital Case* (3), and it does not appear to have been considered by any of the other English Judges who followed *The Hollis' Hospital Case* (3). The direct issue in the case was whether the rule against perpetuities applied to common law conditions subsequent. By certain Letters Patent a grant was made of quit rents amounting to £499 19s 11 $\frac{1}{4}$ d, to hold the same to the grantee his heirs and assigns till he or they should receive and be paid the sum of £5,000 as therein more particularly mentioned. By information, filed upwards of two hundred years after the grant, the Attorney-General asked that Her Majesty should be allowed to redeem the quit rents by paying the sum of £5,000. Palles C.B., who delivered the judgment of the court, pointed out that the grant passed the quit rents in fee subject to the condition determining the fee on making the payment mentioned. Under such a grant the grantee, until the happening of the determining event, has the whole estate in him, and the old common law doctrine was undoubtedly that a possibility of reverter—a possibility coupled with an interest—remained in the grantor. The case for the Crown was that the common law doctrine still prevails notwithstanding the modern rule against perpetuities. After pointing out that the only real question was whether the estate of the Crown was defeated by the rule against perpetuities, Palles C.B. says that the grant in question operated at common law. It did not take effect under the Statute of Uses; and the modern rule against perpetuities never applied to common law conveyances. It was impossible that it could have applied, as it had its origin in the Statute of Uses, a fact which is, as he says, a matter of elementary knowledge; and the subject matter of that statute did not include conveyances other than those to uses. The only mode by which the common law held that a previous estate might be determined before its natural expiration was by means of the annexation of a condition. But if a condition were

(1) [1906] 1 I.R. 406

(3) [1899] 2 Ch. 540

(2) [1906] 1 I.R. 399

annexed, then, on the happening of the stipulated event, the estate was defeated, and the donor or his heirs were entitled to enter, and on entry, or, in a case like that before the court where the subject matter was incorporeal hereditaments, without entry, was in of his former estate. The learned Chief Baron cited a passage from the speech of Lord Cairns (then Lord Chancellor) in *The Buckhurst Peerage Case* (1) at p. 26 as a modern recognition of the common law doctrine referred to, in which Lord Cairns pointed out that at common law what was apparently the grant of an absolute estate could be terminated by the annexation of a condition; but the estate in such event was not defeated for the benefit of the remainder man, for a remainder could not have been annexed to the condition. It was defeated as defeasible by or for the donor who was entitled to enter for condition broken.

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The Lord Chief Baron proceeds in an illuminating judgment referred to by the editors of the 6th edition of *Jarman on Wills* as "the excellent judgment of Pallett C.B. which stands out as an addition to the learning on this branch of law," to express his views on the origin of the rule against perpetuities, and finds support for his conclusions both in the authoritative Report of the Commissioners appointed to enquire into the law of England respecting real property, and also in the opinion of Lord St. Leonards; but it is needless for me to refer to his judgment in further detail. The authority of that judgment has been recognised by the late Court of Appeal in Ireland, a court of co-ordinate jurisdiction with our own, in *In re Tyrrell's Estate* (2), in which Sir Samuel Walker C. said at p. 299 that "the learned judgment of the Lord Chief Baron in *Attorney-General v. Cummins* (3) points out how differently this question stood at common law from what it does under the Statute of Uses." In the conflict of judicial authority which has arisen and in the clash of opinion of the leading text book writers of the day, I unhesitatingly adopt the judgment of the Lord Chief Baron which commends itself to my acceptance on both historical and logical grounds. If it be urged that the conclusion at which I have arrived is anomalous, having regard to the fact

(1) A.C. 1 p. 26

(2) [1907] 1 I.R. 292

(3) [1906] 1 I.R. 406

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that the rule against perpetuities applies to all contingent equitable limitations of real estate, I answer that it is our duty only to construe the law as we find it, and I add in the words of Mr. Challis that "when any part of the common law is found to require amendment the legislature alone is competent to apply the remedy."

This brings me to the last argument which was advanced on behalf of the plaintiffs—that the condition was invalid as being repugnant to the quality of the estate granted. In his connection *In re Macleay* (1) and *In re Lunham's Estate* (2) were cited as illustrating the well recognised proposition that a condition annexed to an absolute gift which takes away the whole power of alienation, as distinguished from merely imposing a partial restriction on alienation, is void. In my opinion these cases have no application to the present, as there is no repugnancy whatever between a conveyance made to trustees expressly for a congregation and a condition that the property should revert to the grantor if the congregation should cease to exist or should become united with any other congregation or cease to exist as a separate and independent congregation.

In my opinion we should answer the question submitted to us as to the plaintiffs' right to recover possession in the negative. As the defence has succeeded only on the narrowest issues in the case, we shall not allow any special costs of this case stated, but shall declare the executors of John Mains Wightman, the sole appellant, entitled only to their costs when taxed and ascertained.

BEST, L.J.—This is a Case Stated by the Lord Chief Justice for the opinion of this court. The matter came before him at the Downpatrick Summer Assizes, 1925, on appeal from a decision of the learned County Court Judge of County Down, who had granted the plaintiffs a decree in ejectment for the possession of certain lands in the civil bill mentioned.

The appeal was taken by John Wightman, one of the original defendants, the other defendant, the Rev. John Stewart, not having appealed. The hearing of the appeal

(1) L.R. 20 Eq. 186.

(2) I.R. 5 Eb. 170

was adjourned from Downpatrick to Belfast, and came before the Lord Chief Justice on 15th January, 1926. During the adjournment the original defendant Wightman died and the civil bill was amended by adding the names of his executors, the Rev. Samuel Mayne Shaw and Wm. Henry Shaw, as defendants.

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The plaintiffs are trustees of the Seaforde Estate, and as such are entitled to all the estate of the grantor under a fee farm grant dated 14th July, 1880. The defendants represent all the estate of the grantees under the said grant. The grant contains covenants for the building of a manse on the lands granted with suitable office houses for the residence of each minister for the time being of the Presbyterian congregation of Seaforde, and there are numerous provisions regulating its use as such manse to which fuller reference will be made hereafter.

The learned Lord Chief Justice found as a fact that the Committee on Union of the General Assembly had power to effect a union between the congregations of Clough and Seaforde, and that the terms of their report, dated 27th June, 1923, afterwards referred to, have been carried out. He also found that there was no specific provision in the code of the Presbyterian Church with regard to union of congregations at the date of the Grant of 1880, and that the Committee on Union was first established by the General Assembly about two years after that date, and that it was given Assembly powers.

The Rev. John Stewart, Minister of Seaforde, retired from the Ministry in 1923, and is in occupation of the manse in question. The Rev. Mr. Orr is now minister of both Seaforde and Clough Congregations. Plaintiffs have claimed the manse, alleging that in the events which have happened they are entitled to possession under the terms of the grant.

On the hearing of the civil bill appeal, the Attorney-General took a preliminary objection that no notice had been served under section 14 of the Conveyancing and Law of Property Act, 1881. This objection had not been taken in the civil bill court. It was argued for the plaintiffs that no notice was necessary, but that if such notice were necessary, the notice hereinafter referred to was sufficient. The learned Lord Chief Justice held that the said notice, dated 26th May, 1924, was a sufficient notice under the

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section, but that plaintiffs were restricted to the only breach specified therein, viz., "the Union," i.e., a union purporting to have been effected between the congregations of Clough and Seaforde.

At the close of plaintiffs' case, the learned Attorney-General argued that the union which had taken place was not a union within the meaning of the grant, secondly that the restrictions in the grant were contrary to the rule against perpetuities, and thirdly that such restrictions were void as repugnant to the estate in fee granted by the deed, and he relied on the cases mentioned by the Chief Justice to sustain the second and third propositions.

The question for the court is: whether, in all the circumstances hereinbefore set out, the plaintiffs are entitled to recover possession of the premises granted by the indenture of 14th July, 1880?

In this indenture the predecessors in title of the defendants are described as trustees nominated by and on behalf of the Presbyterian congregation of Seaforde in connexion with the General Assembly of the Presbyterian Church in Ireland, and it is recited that the said congregation have applied to the said Wm. Brownlow Forde for a grant in fee farm of the said piece of land (being the land the subject matter of the ejectment) for the purpose of erecting thereon a manse with suitable office houses for the residence of each minister for the time being of the said congregation, to be appointed after the present minister, the Rev. J. A. M'Mordie, shall have ceased to be minister of the same congregation, and to be used and occupied solely as a manse by each such after appointed minister as aforesaid during his continuance in office, and the said Wm. Brownlow Forde has agreed to grant such grant in fee farm, and for that purpose has requested the said John Temple Reilly to join in granting the same on the conditions hereinafter respectively mentioned; then follow the grant of the land at the yearly rent reserved and various covenants by the trustees as to payment of rent and erection of a manse, and in particular that the same, i.e., the said manse, shall not be used for any purpose whatsoever other than as a manse or residence for such minister as aforesaid, and, following covenants for quiet enjoyment and against alienation without consent, it is provided that if hereafter, at any time after the manse shall have been

built as aforesaid, the said premises shall be used for any purpose whatsoever other than a manse and residence for the use of such minister as aforesaid unless during the vacancy of the office of minister of the said congregation and that for a period not to exceed two years, or if at any time hereafter the said congregation shall cease to exist or shall cease to be in connexion with the said General Assembly or there shall not be a member thereof acknowledging the jurisdiction of the said General Assembly or professing certain doctrines specified, or if at any time the said Presbyterian Congregation of Seaforde shall become united with any other congregation or cease to exist as a separate and independent congregation, then and in every or any such case or cases these presents and the grant hereby made shall immediately and thereupon cease and become and be thenceforth absolutely null and void except for certain defined purposes such as recovery of rent and of damages for any prior breach of covenant, and in any or every such case or cases a power of re-entry is given.

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It will thus be seen that the grant of the lands was made on certain specified conditions, that on the breach of these conditions or any of them the grant was to become absolutely null and void, and a power of re-entry was reserved to the grantor.

The Lord Chief Justice found as a fact that the terms of the Report of the Committee on Union, dated 27th June, 1923, were carried out.

These terms are contained in the Book of Reports to General Assembly, 1923, and will be found in the report received by Assembly, Minutes, 1923, p. 52. This report is headed "Retirement of Rev. John Stewart," and it deals first of all with the retiring allowance to be received by Mr. Stewart. It is then headed "Terms of Union." Clough and Seaforde.

It provides that "the Congregations of Clough and Seaforde were united as from 5th March, 1923, so as to form one Ministerial Charge" on the following amongst other conditions: 1. That each congregation shall continue to maintain its separate identity with its own Kirk Session and Committee. 3. That when a vacancy occurs in the pastorate of the united congregations the two Kirk Sessions shall act together as one Kirk Session, and the

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two congregations shall act together as one congregation in all matters connected with the election of a minister

4. That the minister of the united congregations shall reside at Clough. 5. That the Sabbath Services shall be held in Clough and in Seaforde at the hours mentioned in the clause or at such other hours as the two Kirk Sessions acting conjointly may determine. 7. That the minister of the united charge shall receive, etc. 8. That the minister of the united charge shall have the use of the Clough manse, etc.

The terms of this report having been carried out according to the finding of fact by the Lord Chief Justice, the question arises : Did the Congregation of Seaforde become united with any other congregation, or did it cease to exist as a separate and independent congregation within the meaning of the terms of the grant?

The Attorney-General and Mr. Megaw pressed us with the argument that there was no union of the congregations within the meaning of the covenant, but when I look at the report received by the Assembly I find it headed "Terms of Union, Clough and Seaforde," and running through it the phrases "United Congregation," "one Congregation," "the two Kirk Sessions acting conjointly," and "United Charge." In my opinion these expressions have no meaning if they do not signify that there has been a union between the two congregations, and further that the congregation of Seaforde has ceased to exist as a separate and independent congregation. How can a congregation whose own minister has retired, which is united with another congregation whether this be a union within the terms of the grant or not, and which, when a vacancy occurs in the pastorate of the united congregations, shall with the other congregations act as one congregation in all matters connected with the election of a minister, be said to exist as a separate and independent congregation?

I come, therefore, to the conclusion that there has been a union of the congregations within the meaning of the grant, and that the congregation of Seaforde has ceased to exist as a separate and independent congregation. The manse to be erected was to be used as a manse or residence for the minister of Seaforde Congregation during his continuance in office, and it was agreed that the same should

not be used for any purpose whatever other than as a manse or residence for such minister as aforesaid. • It follows, therefore, in the events that have happened that there has also been a breach of this covenant. The grant provides that in every or any such case or cases these presents and the grant hereby made shall immediately thereupon cease and be thenceforth absolutely null and void.

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Counsel for plaintiffs argued that the grant was determined by the happening of an event, viz., the union of the congregations of Seaforde and Clough, or by the congregation of Seaforde ceasing to be a separate and independent congregation, or, if this were not so, that there was a breach of covenant.

In what follows I assume that there was a breach of covenant. The cases of *Davenport v. The Queen* (1) and *Quesnel Forks Gold Mining Company Limited v. Ward* (2), which were not referred to in the argument, but were discovered by the industry of my colleague, convince me that the mere happening of the event in this case which gives rise to forfeiture does not by itself render the lease void, but makes it merely voidable at the option of the lessor.

The Lord Chief Justice held that the notice of 26th May, 1924, was sufficient compliance with the provisions of section 14, sub-section (1) of the Conveyancing and Law of Property Act, 1881. That sub-section provides that a right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach. Was the breach of covenant in allowing union to take place or in allowing Seaforde congregation to cease to exist as a separate and

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independent congregation capable of remedy? Mr. Megaw argued that the power that had jurisdiction to create the union, i.e., the General Assembly, had power to dissolve it. It may well be that by the combined efforts of the Seaforde congregation, the trustees thereof, and the General Assembly, the breach of covenant might have been remedied, i.e., this union might have been dissolved and the congregations placed in statu quo ante. If this be so, the defendants were given no opportunity of remedying the breach as required by section 14 of the Act of 1881. I am of opinion, therefore, that the notice was bad for this reason only, but not because it did not require that compensation in money should be made. *Lock v. Pearce* (1) decides that the grantor may forego compensation.

Though not necessary for my decision I proceed to deal shortly with the other points relied on by the defendants. The learned Attorney-General submitted that the restrictions in the grant are void as being contrary to the rule against perpetuities, as the forfeiture clause is a condition subsequent, and he relied on *In re the Trustees of Hollis' Hospital* and *Hague's Contract* (2), *In re Ashforth, Sibley v. Ashforth* (3), and *In re Da Costa, Clarke v. Church of England Collegiate School of St. Peter* (4) as supporting his contentions.

The Plaintiffs relied on *The Attorney-General v. Cummins* (5), a decision of Palles C.B., Andrews and Murphy JJ., as supporting the opposite contention. In that case the learned Lord Chief Baron, who delivered the judgment of the Court, discusses the application of the rule against perpetuities, and lays it down that the doctrine is inapplicable to estates created by common law conveyances, and especially to estates which reverted to donors on the performance (and, I might add, the happening of conditions which determined estates) and in support of this he refers to two authorities—the report of the Commissioners appointed to inquire into the law of England respecting real property, and Lord St. Leonards, in his introduction to his edition of Gilbert on Uses. The passages will be found at p. 411 of the report of the case. The

(1) [1893] 2 Ch. 271

(2) [1899] 2 Ch. 540

(3) [1905] 1 Ch. 535

(4) [1912] 1 Ch. 337

(5) [1906] 1 I.R. 406

Report of the Commissioners was not cited in the *Hollis Hospital Case* (1), which was decided by a single judge, Byrne J. In *In re Ashforth* (2) the interest dealt with was said by Mr. Monroe to be equitable. However, again this was a decision by a single judge, Farwell J. In *In re Da Costa* (3) Mr. Justice Eve followed the decision in the *Hollis Hospital Case* (1), and if the decisions in these cases conflict, as they appear to do, with that of *The Attorney-General v. Cummins* (4), I prefer to follow the latter. I think, therefore, that there is no infringement of the rule against perpetuities.

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There remains the question of repugnancy. This point, though relied on by the Attorney-General on the hearing of the civil bill appeal, was not pressed in the argument addressed to us. I see, however, no repugnancy between the grant of certain lands for the purpose of providing a manse for the use of the minister of a named congregation and the avoidance of that grant when the manse ceased to be used for that purpose.

In my opinion the question put to us by the Lord Chief Justice should be answered in the negative.

Solicitors for the plaintiffs. *J. Murland and Co.*

Solicitor for the defendants: *William Martin.*

J. M'C.

(1) [1899] 2 Ch. 540

(2) [1905] 1 Ch. 535

(3) [1912] 1 Ch. 337

(4) [1906] 1 I R. 406

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[In the House of Lords.]

LAGAN NAVIGATION COMPANY, LTD., v. LAMBEG
BLEACHING, DYEING AND FINISHING
COMPANY, LTD. (1).

*Exercise of statutory powers and duties—Absence of negligence—
Danger caused by act of Nature—Illegal abatement of nuisance
by person injured.*

The appellants were created a company under an Act of 1843 (6 & 7 Vict. c. civ.) which vested in them the property right and liabilities in a navigable canal from Belfast to Lough Neagh. In 1912 the appellants raised a coping round one of the locks on this canal and the banks behind it, to prevent flood water from flowing over the sides of the lock and interfering with the navigation of the canal. The respondents alleged that the appellants had thereby unlawfully penned back flood water on the respondents' lands. In January, 1924, there was a heavy flood in the river and canal, and the respondents without previous notice cut away portion of the banks to allow flood water to run away.

Wilson J. granted an injunction to restrain the respondents from interference with the appellants' banks and damages fixed at ££20 in lieu of an inquiry. The Court of Appeal (Moore C.J. and Andrews L.JJ.) (2) reversed the judgment of Wilson J. holding that the acts complained of were lawful and justified in order to abate an active nuisance.

The House of Lords (3) reversed the judgment of the Court of Appeal and restored the judgment of Wilson J. holding that there was no evidence to establish that the appellants were guilty of negligence in the exercise of their statutory powers or that they had done any wrongful act or been guilty of creating a nuisance; that the respondents had not proved that they had not done unnecessary damage nor that there was not an alternative method, other than the cutting of the banks, to reduce successfully the flooding of their lands.

Geddis v. The Bann Reservoir (3 B.C. 20) and *Bligh v. The Rathangan River Drainage District Board* ([1898] 2 I.R. 205) distinguished.

APPEAL from an Order of His Majesty's Court of Appeal in Northern Ireland (hereinafter styled simply The Court of Appeal), dated the 4th day of November, 1925, which reversed an Order of the Hon. Mr. Justice Wilson made by him sitting in the Chancery Division of the High Court of Justice in Northern Ireland dated the 24th day of

- (1) The Speeches in the House of Lords are printed from Messrs. W. B. Gurney & Sons shorthand notes.
(2) Reported [1926] N.I., 13, 27. (3) Present Lords Atkinson, Shaw of Dunfermline, Wrenbury and Carson.

March, 1925, in an action in the said Division wherein the above-named appellants were plaintiffs and the above-named respondents were defendants.

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J. B. Matthews K.C. (of the English Bar) and *Edmond Warnock* (of the Northern Ireland Bar) for the appellants.

F. H. Maugham K.C. (of the English Bar) and *Arthur Black* (of the Northern Ireland Bar) for the respondents.

LORD ATKINSON: This action was brought by the appellants for, inter alia, an injunction to restrain the respondents from entering on the appellants' undertaking and removing the soil and portion of an embankment at the appellants' Lock 8, and for damages. The respondents justified their acts as being executed in the abatement of a nuisance caused by the appellants in raising embankments on the sides of their canal at Lock 8 thereof. They counterclaimed for an injunction to restrain the appellants from raising these banks so as to cause certain lands and premises belonging to them to be flooded. The questions at issue between the parties resolve themselves into these, namely, whether the respondents were, under the circumstances proved to exist, justified, on the 18th and 21st January, 1924, in digging through and removing certain of the earthen banks built by the appellants on both sides of this Lock No. 8, situate on the Lagan Canal which had been formed by the appellants under the statutory powers conferred upon them. The exact position of the banks so removed is shown on Map No. 1, proved in the action out of which the appeal has arisen, and the description and true position of the different places referred to in the evidence given on the trial of the action are set out on Map No. 2, similarly proved.

Before referring to the several statutes passed by the Irish and English Legislatures respectively enabling the persons and bodies therein respectively named to make a passage by water from Lough Neagh to Belfast (the River Lagan being utilised for that purpose) it would be well to refer to the respondents' defence and counterclaim to ascertain the grounds upon which they endeavoured to justify their action, especially as the case was decided in the Court of Appeal upon a ground never mentioned in the pleadings or in the notice of appeal, or dealt with at

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the trial of the action either in evidence or in argument. As well as I understand it the ground was this, that the appellants though by the several statutes hereinafter referred to authorised to do the particular work complained of, did it negligently and that therefore on the authority of *Geddis v. Bann Reservoir Company* (1) they had no defence to the respondents' counterclaim. The Lord Chief Justice said, in delivering judgment in the Court of Appeal: "The defendants' case really rests on a different footing. It depends, not on wrongs flowing from an unauthorised power exercised by the plaintiffs, but on misuse of powers which give the plaintiffs authority to conduct the navigation," and the other Judge who heard the appeal, Lord Justice Andrews, at page 61 of the Appendix said: "The sole question to be determined appears to me to be whether the plaintiffs, who, as I hold, acted within their statutory powers, were guilty of negligence in the execution of the works complained of." This involves a minute examination of the evidence given before Mr. Justice Wilson in order to discover, if possible, the proof of the negligence relied upon so confidently by the Court of Appeal in Ireland. I think, however, there can be no doubt that it is most unsatisfactory to have a case decided upon a point like this, not raised in the pleadings or apparently dealt with at the trial by the learned judge who presided there, or by the counsel appearing for the parties, or by the witnesses who were examined.

The paragraph of the respondents' defence and counterclaim on which they mainly rely ran as follows: "The defendants were at the time of the matters alleged in the Statement of Claim and still are the owners and occupiers of certain lands and premises adjoining the said Lagan Canal and the River Lagan. Prior to the dates of the matters complained of in the Statement of Claim the plaintiff company by their servants agents and workmen wrongfully and improperly constructed and maintained certain mounds of earth on the banks on both sides of the said Lagan Canal adjoining said number 8 Lock, the effect of which was to pen back and raise the level of the water in

(1) L.R. 3 A.C. 430.

the part of the said canal and River Lagan above the said lock in time of flood, and to throw the water of the Canal and River Lagan upon the said lands of the defendants and to occasion serious flooding of the said lands and to cause the water of the said canal and river to flow into and contaminate certain spring water dams and filter beds of the defendants situated upon their said lands. The defendants had before the dates mentioned in the Statement of Claim frequently requested the plaintiff company to remove the said mounds of earth and to level down the banks of the said canal at the said lock to their original level, but the plaintiff company neglected and refused to do so. On or about the dates mentioned in paragraphs 2 and 3 of the Statement of Claim the waters of the said Canal and River Lagan were, by reason of the said mounds of earth wrongfully constructed and maintained as aforesaid by the plaintiff company, penned and forced back and overflowed and flooded the said lands of the defendants and seriously injured the said lands and damaged and contaminated the defendants' said spring water dams and filter beds and occasioned serious loss and damage to the defendants. The defendants therefore by their servants and workmen for the purpose of abating the said nuisance and relieving the said flooding and preventing damage to their property removed the said mounds of earth or part thereof on the dates mentioned in the Statement of Claim doing no more than was necessary for the said purpose, and these acts of the defendants are the trespasses alleged in the Statement of Claim."

Many statutes were enacted by the Irish parliament from the 27 Geo. II. c. 3 downwards enabling the undertakers therein named to make a passage by water from Lough Neagh to Belfast, the River Lagan being utilised for the purpose. The most important of these statutes is the local Act, 54 Geo. III. (Ir.) c. ccxxxi, s. 2. By it the undertakers therein named were incorporated into a company by the name of the Company of Undertakers of the Lagan Navigation. It authorised and empowered this company to, amongst other things, separate part of the said Lagan Navigation between the 8th and 9th locks thereof from the said River Lagan by carrying the said navigation through

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certain lands of Tullynacross and by diverting the said River Lagan through certain lands in the parish of Lambeg, and to make and complete and maintain a track road for horses from Belfast aforesaid to Lough Neagh along the banks of the said navigation and further in such places as the said company may think fit to make deeper and wider the bed of the River Lagan of the said navigation, and to repair, maintain, amend and uphold all such work and other things as have already been erected, made or done under and by virtue of the said recited Acts or any of them, and to make, execute, do and perform all such works, matters and things as shall be requisite and convenient for completing and maintaining the several canals by this Act authorised to be made and the navigation thereof, and for supplying the same with water, and the making, completing and maintaining of the several improvements and other works above-mentioned according to the true intent and meaning of the Act. By the 17th section of this statute the Act was to continue in force for 21 years from 25th December, 1814. The next statute to which it is necessary to refer is the 6 & 7 Vict. c. 104, by which the appellant company was incorporated. It was entitled an Act to incorporate the persons having claims upon the Lagan Navigation in Ireland, and to provide for the future management and improvements of the said Navigation; and by section 1 it was provided that the parties therein named should be a corporate body by the name of the Lagan Navigation Company. By Sections 2 and 3 of this statute with several other statutes, the last of which was the Ulster Canal and Tyrone Navigation Act, 1888 (51 & 52 Vict. c. cxxxvii), it was enacted that the Acts dealing with the Lagan Canal were to continue in force for 999 years.

By the second section of this Act of 6 & 7 Vict. c. civ., the lands, waters, watercourses, bridges, sluices, drains, locks, weirs, banks, dams, roads, towing paths, and other way, rights, privileges and advantages whatsoever which, on and previously to the 24th day of December, 1835, had been vested in the Company of Undertakers of the Lagan Navigation were vested in the Lagan Navigation Company, and it was provided that they should thenceforth have, for the purposes of the navigation, all such powers (except as

thereinafter provided, which exception is immaterial to the present appeal and need not be stated) as, on or before the 24th day of December, 1835, belonged to or might rightfully have been exercised by the said Company of Undertakers of the Lagan Navigation.

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By section 62 of the Act it was enacted, *inter alia*, that the appellants should at all times keep the said navigation and every part thereof, and all locks, weirs, banks, dams, roads, towing-paths and other ways belonging or appertaining thereto, and all works to be thereafter executed for the improvement thereof, in good substantial and serviceable repair and in an efficient state for all the purposes thereof and of the traffic on the same respectively.

By the 95th section it was enacted, *inter alia*, that if any difference should arise as to the amount of damages occasioned to any lands by the exercise of the powers given by said Act and for which any party might be entitled to demand compensation according to the provisions of the said Act, the amount of the compensation to be paid by the appellants in every such case should be settled by the verdict of a jury in manner thereafter mentioned.

By section 144 it was enacted, *inter alia*, that the appellants might repair, maintain, amend and uphold all such works and other things as had already been erected made or done under or by virtue of the therein recited Acts or any of them.

The 204th section imposed a penalty on any person who should wilfully and maliciously break down or damage or cause to be broken down or damaged any of the works already made or which should be made for the use of the navigation.

These are very wide powers. The paramount purpose and object of the statutes conferring them was to secure that the system of inland navigation which it was designed to establish should be kept in repair and in effective working order, the damage occasioned to any lands by the exercise of those powers to be compensated for in the manner provided by the 95th section.

The maps, which presumably were lodged in the Parliamentary Offices in England and Ireland respectively when

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the aforesaid statutes were passed, have not been put in evidence. There is nothing to show what was the ordinance datum of the water in the canal which was to be maintained or not exceeded, nothing to show what lands adjoining the canal were liable to floods and were thereby injuriously affected, or that compensation in respect of that damage had been paid.

Under the provisions of these Acts the Lagan River was canalised so as to make possible navigation from Lough Neagh to Belfast Harbour. Part of the navigation consists of part of the River Lagan and part of artificial channels. A series of locks (numbered consecutively from Belfast to Lough Neagh), operating in the usual way enabled barges to be raised to higher levels and lowered to lower levels of the navigation as required.

A portion of the navigation from Lock 9 down towards Belfast consists of the River Lagan. About half way down between Lock 9 and Lock 8 an artificial channel began and continued to Lock 8. The navigation between Lock 8 and Lock 7 consists of an artificial channel, and below Lock 7 the canal joins the River Lagan. Lock 8 was in existence prior to the year 1843.

About half way down between Lock 9 and Lock 8 a stone weir had been placed across the bed of the River Lagan in height 60.5 o.d., and further down the river another stone weir of the average height of 60.5 was placed. On the top of this latter weir there were placed boards 15 inches high, which at will could be raised or lowered. These boards have been in existence for over 40 years. There is no evidence as to when or by whom or under what circumstances they were first erected. As they were proved by the respondents to have been removed for four days prior to 18th January, 1924, they do not appear to affect materially the question at issue between the parties litigant after that date.

The effect of the first weir is to turn the water of the River Lagan up to a height of 60.5 into the artificial channel from the weir down to Lock 8 and allow any water above that height to flow down the river to the second or lower weir.

The effect of the latter weir is to form a dam, from which a company called the Lambeg Weaving Company, Limited, can draw water for their works by means of a sluice on the right bank of the river. There is a sluice on the left bank of the river also, beside the lower weir, which can be used to lower the water in times of flood. This sluice is six feet below the level of the lower weir.

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The respondents own the land lying on both sides of the banks of the canal between Lock 9 and Lock 8, but not in close proximity to the latter lock. The land in close proximity to it belongs to the appellants.

The respondents carry on their business in buildings adjoining Lock 9 beyond the east or right bank of the canal, and obtain the portion of the water they require from an open artificial drain running outside the right bank of the canal on the east side thereof.

This artificial drain is admittedly supplied with water from three sources. First from the Lagan Canal, the water passing through a culvert made through the right or eastern bank of the canal and emptying itself into a hole or sump (which is merely an enlargement of the back drain); (2) from a stream running through the respondents' land on the east side of the canal, and (3) from part of the respondents' premises named Gilmores Moss in which there is a spring. It was proved at the hearing that this Moss is flooded from time to time, but not by water coming from the canal. The banks of the Moss are 64 o.d. high and no water from the canal could enter it unless the water in the canal rose to a height above that level, 64 o.d.

There is, moreover, an aqueduct running from the respondents' artificial drain right under the canal, and thence through the respondents' lands lying on the other side of the canal down to a point on the river below the lower weir. The respondents consequently can by opening a sluice or valve on their lands allow the water in their artificial drain to flow, before it reaches their works, through their aqueduct into the river at this latter point. Lock No. 8 was, at the hearing of the case, proved to be 70 feet long. It had at one time on both sides of it a coping of masonry from 3 to 3.3 wide, with wooden gates at both ends of its chamber. The towing-path is actually

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on the east side of the canal. The level of the stone coping varied from 62.7 o.d. to 62.85 o.d. The lock is not as wide as the canal, and the latter is consequently narrowed above the lock so as to form a mouth or entrance to it. These are some of the most important features of the terrain. They are accurately shown on Map No. 2 proved in the trial.

The case was heard by Mr. Justice Wilson sitting in the Chancery Division of the High Court of Justice in Ireland. A considerable body of evidence was given before him, and he arrived at certain conclusions of fact on the most important points in controversy at the hearing. As I understand the conclusions so arrived at by the learned Judge were substantially accepted by both parties at the hearing of the appeal in the Court of Appeal in Ireland. At page 16 of the Appendix he deals with the facts leading up to the dispute between the parties in the following passage of his judgment, which I think it well to set out *in extenso*. It runs thus :

“ I find the facts leading up to the dispute to be (1) : Some time prior to August 1912 the plaintiffs raised the coping along the upper mouth of Lock 8 and down to the upper gate by placing concrete along it to the height of about 15 inches and raised the embankment on both sides of Lock 8 with earth so as to correspond with the raised coping. I think this is proved both by the oral evidence and the condition of the old Pawl which has been partly excavated and shows grooves on it below the surface of the ground. The object of this erection was to prevent flood water coming down this reach of the Canal flowing over Lock 8 and into its chamber or on down to the lower reaches of the Canal. I conclude that it was made effectual for this purpose and that until the flood water at Lock 8 rose 15 inches over the level of the old coping this flood water was penned back in the reach of the Canal above Lock 8. The defendants cannot complain of this erection save to the extent to which it injures them, which I will endeavour to ascertain later. In 1912 the defendants objected to this erection and called for its removal and after a tedious correspondence the additional coping was removed in February 1921 without prejudice to plaintiffs’

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rights. It was alleged by the defendants that the embankments at the back of the coping still remained, and that sod banks had been erected at each end of the lock to control the flow of water in time of flood. Nothing happened from 1921 till 18th January 1924, when there evidently was a very heavy flood both in the river and the canal and all over this part of the country—on that day a number of the defendants' servants proceed from their works along the towing-path up to Lock 8, found an embankment along the mouth and sides of the lock which prevented the flood water getting away over Lock 8 and against the protests of the plaintiffs' only employee, cut channels right along the length of the lock on both sides and let the water above the level of the old coping run along Lock 8 and into the lower reaches of the canal. The plaintiffs immediately restored the embankments and defendants again on 21st January 1924 entered on Lock 8 and again removed them. The plaintiffs' and defendants' contentions are adequately stated in the plaintiffs' letters of 19th January 1924 and 23rd January 1924 and the defendants' letter of 25th January 1924."

Mr. Matthews, who opened the appeal for the appellants, pointed out that the learned Judge fell into error in using in this passage the words "about 15 inches" instead of the correct words "about 12 inches." In the letter dated the 25th of January 1924 Mr. Norman Murray, one of the directors of the defendant company, admits and justifies the action of the servants of the company of which the appellants complain.

The learned Judge then proceeds to point out that the first question to be decided in the action is whether the respondents were entitled to cut away the embankment down to the level of the old coping at Lock 8 as they had in fact done. As bearing upon this question he proceeds to analyse the several statutes already referred to and points out their application to the facts proved, the rights their provisions confer, and the obligations they impose. He deals with the difficulty of carrying out the system of inland navigation authorised by these statutes. He says the undertaking authorised by the statutes was carried out by using the channel of the river where it was permanently

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navigable, and where it was not so navigable, by cutting a canal leading out of the river and carrying it through a series of locks to a lower level where it again joined the river at a point at which it (the river) had become navigable, the necessary supply of water for the canal being obtained by erecting a weir of an ascertained height in the river which necessarily retained and sent along the canal all the water below that height, and afforded to all the water above that height a free vent over the weir and away from the canal. The object of this arrangement obviously was to supply the artificial portion of the canal with sufficient water for the navigation of it, and to divert as far as possible the flood water from the canal so as to keep it navigable. These results, he says, were effected, or intended to be effected, as regards the portion of the canal leading to Lock 8, by the weir erected at the point marked on Map No. 2. The level of this latter weir was proved to be 60.5 o.d., while the level of the coping along the sides of Lock 8 was 62.7 o.d. or 62.8 o.d.

The learned Judge says he could not believe that the engineers who constructed this reach of the canal ever anticipated that in flood times the water in the canal would ever rise beyond the height of 62.7 o.d. and flow along and over Lock 8 and into the chamber of the lock, or down to the lower reaches of the canal, that this would turn the Lock 8 into a waterfall or cascade making it impossible to raise water in the chamber to the same height as in the canal above Lock 8, and in the result to make navigation of the canal impossible. He further says he does not accept the contention of the defendants that Lock 8 was constructed as a vent for flood water in addition to the vent over Weir 1, and considers that it would be utterly inconsistent with the making of a navigable passage from Belfast to Lough Neagh that the towing-path and one of the locks should in flood time be continuously submerged, and the earth at the back of the masonry along the sides of the chamber of the lock be washed constantly away.

The learned Judge then deals elaborately with all the evidence touching the effect of the culvert at the point marked F on Map 2, and also the effect of the weir at A1 on the current and discharging power of the canal and of

the river respectively, and sums up his conclusion on the evidence touching these and other points in controversy in the following passage of his judgment (p. 21 of the Appendix): "It seems to me that having regard to the flood in the river on this occasion, it is very difficult to say to what height the water at point F and in defendants' lands would have risen even if there had been no embankment at Lock 8. The onus of proving this was on the defendants and it has not been discharged. At the same time, I am of opinion that the additional embankment made when the coping at Lock 8 was raised prevented the water when it rose above 62.7 getting away over this lock as quickly as it would have done if there had been no embankment there, and that flood water must have been kept on defendants' premises somewhat longer than it would have been if no embankment existed. The defendants have not satisfied me on the evidence that the water from the canal would not have mixed with the spring water in Gilmores Moss even if no additional embankment above the height of the original coping had been made, but I am satisfied that the embankment had the effect of keeping water from the canal for a longer time and at a greater depth on defendants' lands than would have been the case if no additional embankment had been raised at Lock 8."

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Were then (he asks) the defendants entitled to take the law into their own hands and remove this embankment which the plaintiffs made for the protection of Lock 8 and the navigation through their canal. He then points out that the plaintiffs own the property on both sides of Lock 8, that the lock house is theirs, and that under the express words of Sections 5, of 6 and 7 Vict. c. civ., as being necessary for the purposes of navigation, the property in the towing path is theirs.

He adds: "The right of abatement of nuisance undoubtedly exists, but it is not favoured by the law. The plaintiffs' property extends through many miles of country and is necessarily exposed and unguarded. Any interference with it may cause irreparable damage to a great public work. For this reason, as in the case of railways, provision is made making any person who wilfully breaks down or damages any works made for the use of the said

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navigation guilty of a criminal offence punishable by fine and possibly imprisonment and the defendants broke down this embankment without giving any notice and the embankment was made to protect Lock 8. Is any person, be he mill owner, mill manager, farmer, labourer, or other person who conceives that he is injured by some work made by the plaintiffs for the use of this canal to be at liberty to break down the work, and say that he thought it was unauthorised, in the teeth of such a section?"

Even if the defendants were owners of the land on the wsst side of the lock down to the edge of the lock chamber, they would, he thinks, hold it subject to the right of the plaintiffs under the statutes to use this land for the purpose of their undertaking including the making, if otherwise legal, of the embankment complained of.

He justly points out that in reference to the field of the defendants' land marked "made liable to floods" it was proved that this field is flooded from the river before it is flooded from the canal, and that any flooding of it, therefore, from the canal was not proved to be caused by any act of the plaintiffs' works. The learned Judge winds up his judgment by stating that in his view the defendants in doing what they did committed what was *prima facie* a criminal act under the statutes, and that on that ground alone the plaintiffs would be entitled to the injunction they claim.

He winds up his judgment by stating that, whether the act done by the defendants was a criminal act or not, he was of opinion that when the plaintiffs discovered prior to 1912, that owing to an increased rainfall, or to more extensive drainage in the upper reaches and catchment area of the River Lagan, or to some other cause for which the plaintiffs were not responsible, flood water over the original level of the coping of the Lock 62.7 would come along their reach of the canal, and would, if permitted to flow over the lock, have prevented the canal from being navigable and destroyed the lock, the plaintiffs were entitled under their statutory powers to do the acts complained of to preserve and uphold their lock as portion of the navigable system from Belfast to Lough Neagh. He accordingly granted the plaintiffs the injunction they asked

for, fixed the damages at £20 and dismissed the contention of the respondents with costs on the ground that the respondents were not entitled to do the acts they committed.

I have read most carefully the evidence given in the case. There possibly may be a question as to whether the respondents were responsible criminally for the action they permitted themselves to take. It was, however, in my view illegal even if not criminal. I entirely concur with Mr. Justice Wilson in all the conclusions to which on the evidence he has come, especially all his findings of fact. They are, I think, sound and reliable.

There was no evidence given before either of the Courts to show that the level of the water in the canal or in its lock should only reach a certain height. It was proved before Mr. Justice Wilson that great flooding in Lock 8 and its chamber would impede navigation of the lock, and in my view it is perfectly clear that if the respondents erected clay banks on their own property along each side of this lock to protect their property from being flooded to the injury of the navigation of the lock and canal, it was within the right of the appellants to raise those embankments. Their erection would forward the main and paramount purpose and object of the cited statutes, the facilitation of the navigation of the canal. If the respondents have land near this lock, they must, I think, hold it subject to the main purpose of the Statute—navigation.

I fail altogether to see what expedient other than the erection of these banks of clay the appellants could have resorted to in order to facilitate in time of any flood the navigation of the lock in the way described.

In the Court of Appeal this judgment of Mr. Justice Wilson was reversed. It would appear to me, to have been held by that Court that the principle laid down in the case of *Geddis v. The Bann Reservoir Company* (1) and in *Bligh v. The Rathangan River Drainage District Board* (2), and several other authorities to the like effect applied to this case, that the appellants have been guilty of negligence, within the meaning of Lord Blackburn's judgment in the former of these two cases, in the exercise of their statutory powers, with the result of thereby flooding the lands of the

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respondents. These cases establish, I think, this principle : that if a man or a public body have statutory powers which he or they may at will exercise in a manner hurtful to third parties, or in a manner innocuous to third parties, that man or body will be held to be guilty of negligence if he chooses or they choose the former mode of exercising his or their powers and not the latter, both being available to him or them.

The facts of the case of *Geddis v. The Bann Reservoir* (1) and of the Irish case which followed it are so entirely distinguishable from those of this case that the decisions are inapplicable to it. In the first the respondents had statutory powers to collect water into a large reservoir and discharge it therefrom from time to time as might be deemed necessary through the channel of a little stream, to be carried into the River Bann, but the persons incorporated under the Drainage Acts neglected to cleanse the channel of this little stream of the mud and silt accumulated in it by reason of the increased discharge of the water into it, with the result that it being thus choked through this silt, it overflowed its banks, flooded the appellants' lands and injured them. In this case the Bann Reservoir Company had clearly an option as to which of the two following methods they would choose for the exercise of the statutory powers they possessed—namely, the plan of cleansing and keeping free from silt the channel of the little stream into which they were empowered to discharge considerable quantities of water to be carried along that stream to the River Bann; or the method of discharging the same body of water into the little stream without any periodical cleansing of its bed. They chose the latter, which caused the flooding.

The facts of the Irish case are almost identical in character with those of *Geddis v. The Bann Reservoir* (1), and the same legal principles apply to it. The vital distinction between both these cases and the present case is that here the appellants had no option as to which of two possible courses they would select for the exercise of their statutory powers and the discharge of their statutory duties.

In my view, therefore there was no evidence given in the case which, rightly considered, established that the appellants were guilty of negligence in the exercise of their statutory powers. They had either to erect clay banks, as they were *prima facie* entitled to do, in order to protect their own lands from being flooded, and to secure that the navigation of the lock should not be interfered with or impeded, or utterly to disregard the obligations imposed upon them by the provisions of the statutes I have already referred to.

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In my view, therefore, there was no evidence given at the trial to establish that the appellants in their dealing with the management and protection of Lock 8 and the erection of these clay banks had, as regards the respondents, done any wrongful act or been guilty of creating a nuisance on their property either near Lock 8 or elsewhere.

But assuming that the erection of these clay banks with the resultant flooding caused by them was a nuisance to the respondents, the question remains, were they entitled, without giving any notice of their intention, to enter upon the bank of the canal in the high-handed and aggressive manner in which they did, and cut two small drains or aqueducts on each side of the lock and do the other things described?

It has been well said that the abatement of a nuisance is a remedy which the law does not favour and is not usually advisable, and that its exercise destroys any right of action in respect of the nuisance. In *Lonsdale (Earl) v. Nelson* (1), at p. 313 of the report, Mr. Justice Bell said: "The security of lives and property may sometimes require so speedy a remedy as not to allow time to call upon the person on whose property mischief has arisen to remedy it. In such cases, an intruder would be justified in abating a nuisance from incursion without notice. In all other cases of such nuisances, persons should not take the law into their own hands, but follow the advice of Lord Hale and appeal to the Courts of Justice." In the abatement of the nuisance, unnecessary damage must not be done—*Colchester Corporation v. Brook* (2). In *Campbell Darnys v. Lloyd* (3), Lord Justice Collins, as he then was, in deliver-

(1) 2 B. & C. 302.

(2) 7 Q.B. 339

(3) [1901] 2 Ch. 518.

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ing judgment, expressed himself at p. 524 of the report in the following terms: "The right of abatement by individuals is not regarded with favour by the law. In the words of Lord Hale: 'But because this many times occasions tumults and disorders, the best way to reform public nuisances is by the ordinary Courts of Justice,' " see *Lonsdale v. Nelson* (1). Lord Campbell in *Dimes v. Petley* (2) said: "If there be a nuisance in a public highway, a private individual cannot of his own authority abate it unless it does him a special injury, and he can only interfere with it as far as is necessary to exercise his right of passing along the highway; and without considering whether he must show that the abatement of the nuisance was absolutely necessary to enable him to pass, we clearly think that he cannot justify doing any damage to the property of the person who has improperly placed the nuisance in the highway, if avoiding it he might have passed on with reasonable convenience." Again, where there are two ways of abating a nuisance, the less mischievous is to be followed unless it would inflict some wrong on an innocent third party or the public, and previous notice is given when necessary. This proposition is supported by the following case of high authority decided in the Court of Exchequer, *Roberts v. Rose* (3). Mr. Justice Blackburn, as he then was, delivered the judgment of the Court: at p. 89 of the Report, he lays down some general propositions. He said: "We are all agreed that where a person attempts to justify an interference with property of another in order to abate a nuisance, he may justify himself as against the wrongdoer, so far as his interference is positively necessary. We are also agreed that in abating the nuisance, if there are two ways of doing it, he must choose the least mischievous of the two. We also think that if by one of these alternative methods some wrong would be done to an innocent third party or to the public, then that method cannot be justified at all, although an interference with the wrongdoer himself might be justified." I have already shown, I hope successfully, that the appellants in building these clay banks along the sides of Lock 8 to protect their own land from floods and protect their canal

(1) 2 B & C, at p. 103

(2) 15 Q.B. 276

(3) L.R. 1, Ex. 82

were not wrongdoers, and, according to the judgment of Mr. Justice Wilson, should not have been interfered with.

The respondents have, therefore, in my view, in acting in the high-handed and violent manner in which they have chosen to act, violated every principle laid down by the authorities I have cited touching the abatement of nuisances. The respondents gave no notice of their intended action. They have not proved that they did not do any unnecessary damage. They have not proved that there was not an alternative method other than the cutting of these banks to reduce successfully the flooding of their lands. They have, I think, altogether failed to justify the course they took. On the whole, therefore, I am of opinion that the order appealed from was wrong and should be reversed; that the decision of Mr. Justice Wilson was right and should be affirmed; and that this Appeal should be allowed with costs here and in the Irish Court of Appeal.

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LORD SHAW OF DUMFERMLINE : My Lords, I agree.

The fundamental question at issue between these parties is whether the appellants, the Lagan Navigation Company, acted in breach of their duty towards the Lambeg Bleaching, Dyeing and Finishing Company, the owners of lands on both sides of the banks of the canal.

The duty cast upon the Navigation Company included not only the construction of the canal, but, by Section 62 of the Act 6 and 7 Victoria, chapter civ., "the said Company shall at all times during the continuance of this Act maintain and keep the said navigation and every part thereof and all bridges, sluices, drains, locks, weirs, banks, dams, roads, towing paths," . . . "and all works to be hereafter executed for the improvement thereof in good and substantial and serviceable repair and in an efficient state for all the purposes thereof and of the traffic on the same respectively."

It is maintained that the result of raising, in the year 1912, the level of the coping of the embankment and supporting it from behind by earth-work by the Navigation Company has been to flood their lands, and that *ipso jure* the Navigation Company are responsible in law for the damage so caused.

It is not suggested in the case that the raising of the

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coping was caused by anything in the nature of an alteration in the use or management of the canal, that is to say, any such alteration in the use or management thereof as would have involved a new constructional system. It may well be argued that even although this had been the case, yet the duty of the Navigation Company under the section which I have just quoted would have been the same as in the present case.

It is unnecessary, however, to make any pronouncement as to such a case because the circumstances which brought about the raising of the coping arose because experience has shown that, on rare occasions, such floods had occurred as to demonstrate the necessity for the coping being raised for the protection of the canal. It is not denied that the effect of the flood if the coping was not raised, but was left as before, would be to expose the lock in such a manner that the overflowing water would cut away the back thereof and, if allowed to continue, would wash it away. Had accordingly, measures not been taken by the raising of the coping to prevent such an overflow, and had the result been the breaking down of the damming works, there would apparently have occurred such a breach of duty upon the part of the Navigation Company as would have formed a good ground of action by any parties endamaged thereby.

But the foundation of the present complaint by the riparian owners is precisely to the opposite effect, namely, that the Lagan Navigation Company did not neglect to take, but did take, steps which were necessary to protect the canal and the navigation thereof in terms of the Statute. The whole case as to their having improperly done that—so far as such protection was concerned—has disappeared, and what is left is the complaint—and that alone as urged at the Bar of the House—that a statutory duty rested upon the Navigation Company to construct not only works protective of their own property but also works protective of the property of their neighbours.

This raises in a bold form a question which I hold to have been long settled. The authorities are entered upon with fulness in the judgment of my noble and learned friend who has preceded me, and I therefore do not presume to re-enumerate them at length, and make my observations brief.

This is a case of a common danger cause by an act of nature. I refer to Field, L.R. (1), and especially to the judgment of Lord Bramwell, to the Commissioners of Sewers of Pagham (2), and further to the judgment of Chief Justice Tenterden (a case of a public authority executing works against inroads of the sea). In *Gerrard v. Crowe* (3), a riparian proprietor had protected his land from flooding overflow with the result that there was an increase of overflow on an opposite proprietor's lands. The authorities are collected and analysed by Lord Cave. "The general rule," says the Lord Chancellor, is well settled. In *Farquharson v. Farquharson* (4) the rule was stated as follows: "It was found lawful for one to build a fence upon his own ground from the side of a river to prevent damage to his ground from the overflow of the river, though thereby a damage should happen to his neighbour by throwing the whole overflow in time of flood upon his ground." The Lord Chancellor uses the phrase as to protection against a "common enemy" which had been used in preceding cases.

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If the above, so often repeated, be the law with regard to the duty of each riparian proprietor being bound to protect himself in a case where one has executed protective work upon his own property, it may well be argued that the present case is *a fortiori* one in which the same principle ought to be applied, seeing that the works protective of the navigation were here in the nature of a statutory requirement.

Upon decision, the avoidance of liability by authorities acting strictly in execution of statutory powers and without negligence is clear. The words of Lord Blackburn in *Geddes v. Proprietors of Bann Reservoir* remain of the highest authority, namely:—"I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the Legislature has authorised if it be done without negligence, although it does occasion damage to anyone; but an action does lie for

(1) 110 Exch.
(2) 8 B & C 355

(3) [1921] A.C. 395
(4) [1741] Mor. 12779

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doing that which the Legislature has authorised, if it be done negligently.”

In one view, it is not necessary in the present case to enter upon that inquiry. And for the following reason : up to this moment it is not suggested with any clearness or plainness what it is that the Lagan Navigation Company in supplement to and as a corollary of their statutory duties to protect the canal and navigation should have done. The case, as pleaded, made no such suggestion and was rested simply upon the footing that damage was caused to the defendants by reason of the plaintiffs having done what the Statute required. In my view, when the action of a party has conformed to a statutory obligation, it would require a case of great precision of statement upon the part of the adjoining owner to set out what works additional to those needful under the Statute were also impliedly to be undertaken. There was no such statement or pleading before Mr. Justice Wilson.

That learned Judge, however, acted, in my view, in the interests of both parties and with great propriety in getting a report under the terms of which both parties could come together in their mutual interest, so as to avoid a common danger. The report suggested certain things to be done, including the acquisition of other property in order that works of a relatively small but safe-guarding kind should be executed on lands other than those now possessed by the Navigation Company.

It was objected in the Court of Appeal that this was not evidence in the cause, and that objection, which was repeated at their Lordships' Bar, is technically sound ; but the odd thing is that in the Court of Appeal in Ireland one of the Judges suggested at his own hand, another scheme of the nature of lateral escape by a grid-work arrangement, while in this House the counsel for the appellants proposed a scheme, neither sanctioned by the report nor suggested in the Court below, to the effect that the Navigation Company should do effectively and lawfully something of the nature of the very thing which had, high-handedly and ineffectively, been done by the respondents themselves. I think this manner of handling rights in law should not be sanctioned, and it confirms me in the view of the need for a

precise conception being formed and stated of the scheme of protective works which is alleged to be supplementary to and arising out of statutory obligations.

In deciding this case, and noting the absence from the beginning of the pleadings, or now, of any feasible suggestion of such a scheme of protective works, I further do not conceal from myself that enough has been shown in the case to indicate that if the parties meet together in a reasonable spirit, they can achieve protection all round, both for the canal and the riparian interests. In my view, the appeal should be allowed and the judgments pronounced in both cases by Mr. Justice Wilson should be reverted to.

I agree entirely in condemning the unauthorised and high-handed proceedings of the respondents in committing a trespass upon the appellants' property and attempting at their own hands, and against the will of the respondents, to provide a remedy by violent entry and operations upon that property.

LORD WRENBURY : My Lords, in my opinion the decision of the Trial Judge was right and this Appeal must be allowed. I do not find that the case involves any difficult question of law. I content myself with stating some facts which are not in dispute and which in my judgment lead without doubt to the conclusion at which I have arrived.

The Navigation Co. owed the statutory duty and were clothed with statutory powers to construct, maintain and amend works necessary for the navigation of the River Lagan. For this purpose they constructed across a bend of the river a navigation cut running from south-east to north-west and in it placed Lock No. 8. For the purposes of navigation it was obviously necessary that the works should be so constructed as that the Navigation Co. should be able to assure a state of things in which the level of the water below the top gate of the lock (that is to say, in the chamber of the lock) could be brought up to the level of the water immediately above the top gate at any time when a vessel (say, going down) wanted to enter the lock. Unless this was assured the top gate could not be opened and the vessel could not enter the lock.

For this purpose the Navigation Co. so constructed the

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chamber of the lock as that its containing walls rose to a height of 64 feet or something more above the datum line. The banks of the navigation cut above the lock were also constructed to a height something more than 64 feet above datum. The result was to enable the upper gate of the lock to be opened when the level of the water in the navigation cut rose to a height of 64 feet or something more above datum. This was a reasonable construction in the interests of that which the Navigation Co. were by statute charged to ensure, viz., the navigation of the river.

The respondents are owners of lands lying alongside and to the south-east of the navigation cut. They have bleach works upon those lands. For the purposes of their business they require water. Their lands are liable to floods from water flowing in a north-westerly direction from streams and sources other than the Lagan River with which the Navigation Co. are in no way concerned. There is a piece of ground called Gilmores Moss in which there is a spring. Flood water from these streams and sources is apt to accumulate. The respondents' conduct and control water coming from these streams and sources by channels leading to their bleach works. For their own convenience they have upon their own land constructed a sump in which the water in question is collected and from which it is led to the bleach works. In order to protect themselves against an excess of flood water in the sump coming from the streams and sources to which I have referred they opened a culvert from the sump into the navigation cut and made the containing walls of their sump to extend to 64 feet above datum with the result that if the water in the navigation cut were below 64 and the level in the sump were above it, the water in the sump would be kept down by the flow of water from the sump to the navigation cut. Of course it resulted also from this construction that if the level in the cut rose above 64 and the water in the sump were below it, water would flow from the cut into the sump. At the time at which the respondents acted as presently stated this state of things had arisen. The level in the cut was more than 64 and water from the cut flowed into the sump and the respondents' works and lands were flooded by water from the cut. No such flood would have occurred if the culvert from the cut had not been constructed

by the respondents. The respondents were flooded not by any overflow of the cut but by water brought by the respondents from the cut into the sump by the works which they had thought proper to construct for their own convenience on their own land.

In this state of facts the respondents on the 18th January, 1924, went with an "effective force" as the witness David Kirkpatrick calls it and cut away the containing walls of the chamber of the lock on each side and cut away the banks of the cut as it approaches the lock to a depth sufficient to allow a torrent of water to flow past the lock and discharge itself into the river below the lock. In other words the respondents arbitrarily and with a force sufficient to overpower resistance converted the lock pro tanto into a weir. In my opinion this act was one of arbitrary unlawful violence and it is impossible to justify it. The subsequent history is not very material. The Navigation Co. restored the damaged banks. The respondents repeated their previous act and in the result the writ in this action was issued.

From the above statement of facts it results that the respondents would not have suffered any flooding from the navigation cut if they had not opened a culvert from the cut into their land—neither would they have suffered if they had opened the culvert but had raised the walls of their sump to (say) 65 feet instead of 64. No water would have flowed from the navigation cut over the respondents' lands if the respondents had not by their own act on their own land provided the means for its access.

The navigation cut from the point where it leaves the river to the top gate of the lock was and was intended to be for the purposes of the Navigation Co.'s operations dead water. There would never be any flow along it except when the lock was operated and water was caused to flow for the service of the lock. The acts of the respondents threw upon the cut a flow whose object was to keep down the level of the river and which made that which should have been dead water into a stream running to a weir with the object of assisting the river in discharging the flood water. This was wholly illegitimate. The Navigation Co. owed no duty to do that and the respondents

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were wholly wrong in arbitrarily altering the Company's works so as to cast that duty upon them.

For these reasons and without discussing any question of law I am of opinion that this Appeal succeeds.

LORD CARSON : My Lords, I concur.

LORD ATKINSON : My Lords, I have been requested by my noble and learned friend Viscount Dunedin to say that he concurs in the judgments just delivered.

Questions put :

That the Order appealed from be reversed.

The Contents have it.

That the Judgment of Mr. Justice Wilson be restored and that the respondents do pay to the appellants their costs here and in the Court of Appeal in Northern Ireland.

The Contents have it.

Agents for the appellants : *H. H. Wells & Son for White M'Millan & Wheeler.*

Agents for the Respondents : *Blyth, Dulton Hartley & Blyth for Robert Wallace.*

THE COUNTY COUNCIL OF THE COUNTY OF DOWN

v.

WILLIAM JOHN STEWART (1).

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Dec. 14

(1925. No. 3626.)

Roads—Extraordinary Traffic—Injury—Alternative methods of repair—Reconstruction—Betterment—“Necessary Expenses”—Public Roads (Ireland) Act, 1 & 2 Geo. 5 ch. 45 s. 1 (1).

The defendant conveyed large quantities of building material along certain roads which the plaintiffs were obliged by statute to keep in repair. The plaintiffs sought to recover £4,625, the amount expended by them in repairing the damage caused, as they alleged, by the extraordinary traffic of the defendant.

At the trial before Moore C.J. three bases of compensation were suggested: first, the sum of £4,625 actually expended by the plaintiffs in substituting tar macadam roads for what had previously been well-worn water bound macadam; second, the sum of £2,000 the cost of resurfacing the roads with water bound macadam; third, a sum of £175 to £225, the cost of darning and patching the roads so as to leave them in the actual condition in which they were before the extraordinary traffic began. The judge excluded the first basis from the consideration of the jury. The jury found that damage to the roads had been caused by the extraordinary traffic of the defendant and awarded the plaintiffs £300.

The plaintiffs moved for a new trial on the ground of misdirection by the learned judge in telling the jury that they could only award a sum sufficient to put the roads into the same condition as they were in when the defendant's excessive traffic began, and because he did not tell them that, if the works carried out by the plaintiffs became necessary by reason of the excessive traffic of the defendant, the plaintiffs were entitled to recover the full expenses thereby incurred, and upon the further ground that the damages were inadequate and the trial unsatisfactory. The defendant did not challenge the answer of the jury in regard to liability.

Held, by the Court of Appeal (Andrews and Best L.J.J.) that it is not the total sum actually spent on repair that is recoverable by the road authority, whether that repair involves reconstruction or not. Regard must be had to all the circumstances of the case: the state of the roads when the extraordinary traffic commenced: its general character and suitability for the traffic reasonably to be expected thereon: the amount of ordinary traffic whether of the defendant or other persons, and the extent and nature of the repairs reasonably required. Deductions should also be made if roads when repaired are in a better condition than before extraordinary traffic commenced.

(1) In the Court of Appeal before Andrews, L.J., and Best, L.J.

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And *held*, that there was no misdirection or non-direction by the trial judge, that the jury were justified in taking the view that the roads could have been satisfactorily repaired without reconstruction or resurfacing, and that the finding of the jury should not be disturbed.

APPEAL by the plaintiffs from the verdict and judgment entered in the action in favour of the defendant, and for an order that it might be set aside and for a new trial upon the grounds of misdirection, non-direction, and inadequacy of damages, and upon the further ground that the trial was unsatisfactory.

The action was brought under sec. 1 sub-sec. (1) of The Public Roads (Ir.) Act, 1911, to recover extraordinary expenses that had become necessary for the purpose of repairing certain roads which the plaintiffs were bound to repair, and which it was alleged were damaged by excessive weight passing over them, or extraordinary traffic being on them by order of the defendant.

The defendant on the 13th day of October, 1924, entered into a contract with the Commissioners of His Majesty's Works and Public Buildings to carry out certain works at the site of the New Parliament Buildings, Stormont, Belfast, and in order to carry out the works, materials in large quantities had to be conveyed over the roads in question from certain quarries and gravel pits in the neighbourhood, with the result that the excessive weight passing over the roads, and the extraordinary traffic thereon, took place.

The plaintiffs' surveyor issued a number of certificates under sec. 1 of the said Act, and these purported to show what extraordinary expenses had become necessary by reason of the damage arising from such weight or traffic as aforesaid; and it was for recovery of the sums so certified, amounting in all to £4,625, that the action was brought, and in the alternative the plaintiffs claimed £5,000 damages for nuisance. The defendant pleaded that the surveyor's certificates did not comply with the Public Roads (Ireland) Act, 1911, and there was a special plea that, prior to and during the period referred to in the Statement of Claim, the local authority responsible for the maintenance of the said highways failed and neglected to keep any of the roads referred to in the Statement of Claim in a proper state of repair or adequate or suitable for the requirements of modern traffic, and if any extraordinary damage or expense had been caused to or in-

curred in respect of any portions of such roads during the said period, it was altogether as a result of such failure or neglect. In addition, the defendant, whilst denying all liability, brought into court the sum of £500 with the defence as being sufficient to satisfy the plaintiffs' claim in the action.

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The action was tried by the Lord Chief Justice and a special jury of the City of Belfast, and the following questions were submitted to the jury and answered as follows :
1. Did the defendant cause damage to the roads or any of them by reason of extraordinary traffic thereon?—Yes.
2. If so, damages?—Three hundred pounds.

On these findings judgment was entered for the defendant. From this judgment the plaintiffs appealed on the grounds already mentioned.

On the trial of the action the first witness examined for the plaintiffs was their county surveyor, who proved the maps and gave evidence as to the condition and state of repair of the various roads before the extraordinary traffic began. They were, according to this witness, generally in good order and fit to maintain the traffic generally passing over them, such as that arising from farm carts, private cars, a few commercial motors, and lorry traffic to a limited extent. One of the roads in particular, Castle-hill road, had been rolled with water-bound macadam from end to end in the autumn of 1924 and was in thoroughly good condition. In January, 1925, the witness noticed injury to this road. He inspected all the roads in question on 20th February, 1925. He found certain parts tracked, pot-holed, and the surface in places entirely broken through.

On the 17th of July, 1925, along with the assistant county surveyor, he carefully checked and measured up all the roads for the purpose of preparing the certificates specified in section 1, sub-section (1), of the Act. Generally speaking, the roads had deteriorated very considerably in condition since January, 1925, and repairs to all the portions damaged had become imperatively necessary.

Specifications for the repair of the roads were prepared, tenders for carrying out the work were accepted, and the amount actually expended thereon was £4,600 10s 0d. The defendant was requested to inspect the specifications, but whether he did so or not does not appear from the

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evidence. The specifications provided for supplying and laying bituminous macadam and steam rolling same on some of the said roads, and for supplying, spreading and steam rolling coarse broken stones on other of the said roads. The witness further stated that all the work as specified was necessary for the proper repair of each road. He admitted that the various roads were made stronger than they had been before the extraordinary traffic began, and in answer to the Lord Chief Justice could not say why the defendant should pay for the stronger roads as distinguished from putting them back into the same repair, i.e., the state of repair prior to the coming upon them of the extraordinary traffic, and he did not see why defendant should be charged with the extra cost of improved roads.

This witness also said that the cost of replacing the old roads in the condition in which they were before defendant's traffic damaged them would be in or about £2,000.

The County Surveyor's evidence was corroborated generally by that of his assistant.

Mr. Swiney, another witness for plaintiffs, in cross-examination by the Attorney-General, admitted that the County Council were getting "better roads for old ones; modern roads for country roads."

The Chairman of a Rural Council through which some of the roads ran, on cross-examination, said: "I think we could not repair roads any different way; we are doing same to other roads."

The defendant and other witnesses on his behalf gave evidence as to the condition of the roads before the excessive user began and after its termination, and contended that the roads could have been repaired by the process of "darning," i.e., by filling up holes and cracks here and there, and the cost of such work was estimated by one witness at one hundred and seventy-five pounds and by another at two hundred and twenty-five pounds, more or less.

The learned judge told the jury that if defendant caused damage to the roads, the measure of his liability would be the cost of restoring the roads to the same condition in which they were before the damage was done, provided such repairs were reasonably carried out, and also subject

to this that on replacement the injured party might necessarily have to receive a new article instead of an old one and it was open to juries on that account to make some deduction if they so desired from the amount awarded.

He also told the jury that, having regard to the evidence of the surveyor for plaintiffs, it would not be reasonable to charge the defendant the whole four thousand six hundred pounds, which included the extra cost of replacing by tar macadam the damage to an ordinary macadam road, at double the price. He told them that on the evidence, repairing a macadam road could be done in one of two ways—(a) either by taking it up and relaying the whole surface at a cost estimated in the present case by plaintiffs at two thousand pounds, more or less, or (b) by filling up holes and cracks here and there, described as “darning,” at a cost estimated by the defendant’s witnesses at anything between one hundred and seventy-five pounds and two hundred and twenty-five pounds, more or less.

He told the jury that it was entirely a question for them which was the reasonable basis to adopt, and at what figure in the present case, and he reports that he offered no opinion of his own on the question and would have been content equally with a verdict on either basis.

The jury assessed the damages at three hundred pounds.

The learned Lord Chief Justice was of opinion that the trial was in every respect satisfactory, that the jury were attentive and intelligent, and that if they took the defendant’s view that “darning” the roads was sufficient, the damages are not at all inadequate.

At the close of the learned judge’s charge to the jury, Mr. Begley, K.C., for the plaintiffs, made the following objection:—I respectfully object to your lordship’s charge to the jury that the law only compels the defendant to put the roads into the condition in which they were before the damage.

E. S. Murphy K.C., Begley K.C. and Hume for the plaintiffs and appellants:—

This action is brought under the provisions of the Public Roads (Ireland) Act, 1911, section (1), sub-section (1). Extraordinary traffic is defined and the principle of the

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corresponding English Act explained, in *Hill v. Thomas* (1), where Bowen L.J., delivering the judgment of the Court, arrived at the result that "extraordinary traffic," as distinct from "excessive weight," will include all such continuous or repeated user of the road by a person's vehicles as is out of the common order of traffic, and as may be calculated to damage the highway and increase the expenditure on its repair. Extraordinary traffic is also defined in *Etherley Grange Coal Company Limited v. Buckland District Highway Board* (2). See also *Savin v. Oswestry Highway Board* (3), where "the appellant, owner of locomotive engines, used them on a highway which was originally sufficient for ordinary light traffic, but was greatly damaged by the heavy traffic of the engines. The Highway Board were obliged not merely to repair, but reconstruct the road, and an expenditure of £500 was thereby incurred. The repairs and reconstruction items could not be severed. It was held that S. was rightly ordered to pay the sum of £500 and it was immaterial that his engines were made and used in accordance with the statute." Mr. Justice Lush in the course of his judgment said at p. 767:—"The consequence has been that the Highway Board found it necessary to put the road into thorough repair and this could not be done without reconstructing it in a better and more permanent manner. It is said that the road is now better than it ever was before. That has, no doubt, been the inevitable consequence of the damage done by the locomotives, and it seems that the Board cannot sever the one cause of expenditure from the other. That is not their fault. It must be on the wrongdoer to bear that inconvenience." That case is a clear authority for the present one. The roads to which the damage was done by the defendant were well maintained, but not adequate to carry the extraordinary traffic. They are now well repaired according to the best standards and are in a better condition than ever before. The defendant says that the plaintiffs were only entitled to darn and patch the roads. That was impossible and would only have been labour thrown away. But there has been no reconstruction of the roads, such as there would have been

(1) [1893] 2 Q.B. 333

(3) 44 J.P. 766

(2) [1894] 1 Q.B. 37

if concrete roads had been laid : there has merely been resurfacing by tar macadam.

In the recent English case of *Southern Railway Company v. Gosport Corporation and Eddison Steam Rolling Company* (1), the Court of Appeal, while agreeing that the defendant Corporation were solely liable, reversed Mr. Justice Greer on the question of damages and entered judgment for the plaintiffs for the full amount claimed, on the ground that there was no evidence to support the finding that the bridge would have collapsed in six months, but on the contrary it would have been fit for ordinary traffic for an indefinite period in the future. This decision clearly supports *Savin v. Oswestry Highway Board* (2), and indeed goes further. In the present case, all ordinary traffic was borne adequately by the existing roads, but they were ruined by the extraordinary traffic of the defendant. In *Cambridge County Council v. Pepper and Hollis* (3), it was decided that the court is entitled to make certain deductions from a plaintiff's claim of the actual amount expended on the roads in such a case as this, but the learned Chief Justice ruled the actual amount expended by the present plaintiffs out of the case. It is the actual sum expended on repairing the roads, from which any deductions, which should be small, are to be made. The plaintiffs were entitled to choose the best method of repairing the roads in order to fit them to bear the increased traffic and the defendant must pay the bill.

It is clear from the small damages awarded that the jury did not properly consider the facts, and that the learned Chief Justice misdirected them on the principle to be applied in assessing damage.

The *Attorney-General* (A. B. Babington K.C.), *Megaw K.C.* and *Macdermott* for the defendants and respondents :

Can the defendant be made liable for a sum more than that sufficient to put the roads into the condition in which they were before the damage was done? Legally the defendants are liable for the cost of repairs and nothing more : section 1, sub-section 3 of the Public Roads

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(1) [1926] 2 K.B. 89 and 60 I.T.L. 187 [Misc.]

(2) 44 J.P. 766

(3) 76 J.P. 373

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(Ireland) Act, 1911. The findings are quite proper and there is no suggestion that the jury were perverse or that their verdict was against the weight of the evidence.

It is the duty of a road authority to change the character of the roads in a neighbourhood as that neighbourhood changes. The neighbourhood around Stormont is changing rapidly and the plaintiffs are seeking to charge the defendant with the total cost of the new roads. The defendant's user of the roads, though it may have been excessive, was legal: in *Southern Railway Company v. Gosport Corporation and Eddison Steam Rolling Company* (1) the user was illegal.

The doctrine laid down in *Cambridge County Council v. Pepper and Hollis* (2) is proper; and see *Mayo County Council v. M'Anish* (3) and *Kerry County Council v. Fletcher* (4), where damages were awarded on the basis of the costs of leaving the roads in their prior condition. See also *Weston-super-Mare Urban District Council v. Butt and Company* (5) affirmed in the House of Lords (6).

It is the duty of the plaintiffs to provide roads for the traffic reasonably to be expected in the future, but not to throw the whole cost on the person who has damaged the roads by excessive user.

The jury clearly came to the conclusion that £300 would put the roads into the condition they were in previously; that the plaintiff chose to expend more than this and make in effect new roads is nothing to the judge and jury. Mr. Begley's objection to the charge does not refer to what the learned Chief Justice said about darning the roads.

According to the plaintiffs it makes no difference whether damage is caused to a first class road or to a country lane: in either case, the defendant must pay the same damages. Once a bad road is damaged the plaintiffs say they will turn it into a good road and the defendant must bear the total cost. These roads are now in an entirely different category to what they were in previously. The plaintiffs gave no evidence by which the jury could get at the cost of repairing so as to leave the roads as they were before.

(1) [1926] 2 K.B. 892 and 60 I.L.T. 187 (Misc.)

(2) 76 J.P. 393

(5) [1919] 1 Ch. 11 at p 21

(3) 47 I.L.T.R. 120

(6) [1922] 1 A.C. 340

(4) 50 I.L.T.R. 86

If the objection to the learned Chief Justice's charge is right, it follows that the Public Roads (Ireland) Act, 1911, condemns the defendant to provide new roads of whatever character the plaintiffs chose to lay down. *Hill v. Thomas* (1) has been referred to by the plaintiffs as an authority in their favour, but see the judgment of Bowen L.J. at p. 345.

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It is clear from the evidence of the County Surveyor that the plaintiffs were looking to the traffic to be borne by these roads in the future, otherwise they would not have repaired the roads in the manner they did.

At the trial the plaintiffs were unable to sustain their case that they were entitled to charge the full amount expended against the defendant. The learned Chief Justice dealt with the case in the only possible way: no question of principle is involved in his charge: all question of principle was ruled on by the Chief Justice when he said that the full amount of £4,600 was no longer in the case. At that stage the plaintiffs should have asked for judgment for £4,600 as it was an agreed amount.

What the jury in fact implied by their finding of £300 damages was that if the roads were darned, the plaintiffs would have had roads as they were before the excessive user occurred.

The plaintiffs did not request the learned Chief Justice to leave questions on the question of principle. This appeal is on the question of principle: restoration versus reconstruction.

The verdict of the jury was a proper one and should not be disturbed.

E. S. Murphy K.C. in reply:—

The plaintiffs' claim is for the damage done to portions of certain roads. The defendant argues that this claim cannot succeed because they have now got new roads. But the plaintiffs did not construct new roads: they merely adopted a durable method of repair—tar macadam. There was no construction of new roads or portions of new roads, but merely a resurfacing of certain portions of roads damaged by the extraordinary traffic of the defendant.

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Savin v. Oswestry Highway Board (1) was not discussed by Eve. J. in *Weston-super-Mare Urban District Council v. Butt and Company* (2), which, indeed, was a case in which the roads had been completely reconstructed by laying granite setts. *Lord Aveling v. Lucas* (3) shows that the present is not an unreasonable claim.

The expression "incurred" in the Highways and Locomotives (Amendment) Act, 1878, must mean "necessarily incurred."

[Andrews L.J. :—Why not "reasonably incurred?"]

That has never been suggested in any case and the English cases have always been applied in the Irish ones as if there were no difference between the statutes.

[Andrews L.J. :—Can there be said to be a miscarriage of justice, when the learned Chief Justice refusing to put the larger claim, did put a lesser one which was rejected by the jury.]

The refusal to put the larger claim prejudiced the plaintiff at the trial.

Cur ad vult.

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ANDREWS L.J. : This is an application by the plaintiffs for an order that the verdict and judgment entered for the defendant at the trial be set aside and a new trial ordered. The action was brought to recover the sum of £4,625, being the total amount for which several certificates had been given by the plaintiffs' County Surveyor in respect of extraordinary expenses, which, it was alleged, had become necessary for the purpose of repairing certain roads by reason of the damage caused by excessive weight passing along same or extraordinary traffic thereon.

The defendant, who is a building contractor, in the fulfilment of a contract connected with building foundations at Stormont, between 1st October, 1924, and 17th July, 1925, caused large quantities of building material to be conveyed along the said roads, which, the plaintiffs contend, caused serious injury thereto. The defendant, whilst denying liability on various grounds, lodged in court the sum of £500. The trial appears to have resolved itself largely into an assessment of damages upon which

(1) 44 J.P. 766

(3) 44 J.P. 560

(2) [1919] 1 Ch. 11

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the defendant may be said to have succeeded, as the verdict for £300, being less than the amount which had been lodged, entitled the defendant to judgment. The only other question submitted to the jury was whether the defendant caused damage to the roads or any of them by reason of extraordinary traffic thereon, to which the jury replied in the affirmative.

The grounds relied upon by the plaintiffs in support of their application are that the learned judge told the jury that they could only award to the plaintiffs such a sum as would be sufficient to put the roads into the same condition as they were in at the time when the defendant's excessive traffic began, and that he did not tell them that, if the works carried out by the plaintiffs to the roads became necessary by reason of the excessive traffic of the defendant, the plaintiffs were entitled to recover the full expense incurred by reason of such work. The plaintiffs further contend that the damages awarded were inadequate, and that the trial was unsatisfactory. The defendant does not challenge the answer of the jury in regard to "extraordinary traffic." In this, in my opinion, he is right, as the jury were amply justified in finding "extraordinary traffic" as that term was defined in *Hill v. Thomas* (1).

The material facts of the case may be shortly stated. The total weight of stones and material drawn over the roads, including the weight of the lorries, was 58,256 tons. More than one half of this was conveyed over Castle Hill road. There was much conflicting testimony as to the condition of the roads, other than Castle Hill road, when the traffic commenced, the plaintiffs contending that they were generally in good order and fit to maintain the class of traffic generally passing over them, whilst the defendant produced several witnesses who deposed to their generally defective character. There was no dispute as to Castle Hill road having a good steam-rolled surface of water-bound macadam, for the work upon it had been completed only a very short time before the extraordinary traffic commenced; but the contractor who carried out this work described the road as always soft. There is very contradictory evidence as to the condition of all the roads

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when this extraordinary traffic ceased. The plaintiffs referred to the existence of large tracks, deep potholes, and a broken surface, portion of the roads being ploughed up and a mass of clay, sand, and stone; and even Castle Hill road had, it was alleged, a deep track from end to end up the middle of the road, its sides having a broken and bulged surface. The defendant admitted damage, but to a much smaller extent.

Passing now to the several grounds relied on in support of the application, the only argument addressed to us that the trial was unsatisfactory was that the damages awarded were too small. It is well established that to justify the intervention of the court on the ground of inadequacy of damages, it must appear either that the verdict was perverse, or that there has been some material misdirection or mistake in law on the part of the judge who presided at the trial, or some miscalculation of figures by the jury, or that the verdict obviously indicates either such a compromise as amounted to a total refusal of the jurors to discharge their duty, or an omission by them to take into consideration some of the elements of damage properly involved in the plaintiffs' claim. It is the duty of the jury in a case of this nature to award fair and reasonable compensation commensurate to the injury sustained. Whilst it is recognised that the amount of damages awarded must, to prevent abuses, be subject to supervision, it is not competent for the court to direct a new trial on a question which is, generally speaking, considered to be within the special province of the jury, merely because it takes a different view and thinks that it would have awarded a larger amount. Especially does this principle apply in a case such as the present where the trial judge expresses no dissatisfaction with the verdict.

I have listened to the arguments and have perused the evidence in a vain endeavour to find any trace of perversity, miscalculation of figures by the jury, or evidence of compromise. It appears, therefore, to me that this application must fail unless the plaintiffs can establish either material misdirection or non-direction on the part of the learned Lord Chief Justice, or that the jury wrongfully omitted to take into consideration certain elements of damage properly involved in the plaintiffs' claim. It, therefore, becomes necessary to consider what are the

elements of damage which may properly be considered by a jury in such a case as the present, and what are the principles underlying the same.

Three distinct bases of compensation have been suggested, two by the plaintiffs and one by the defendant. The first is that embodied in the statement of claim, which claims the full amount of £4,625 certified by the county surveyor to have been the extraordinary expenses which had become necessary over and above the average expenses necessary for the repair of the roads. This sum has actually been spent upon the roads, but the result has been the substitution throughout their entire length of well rolled, good surfaced, tar-macadamed roads for those which were previously merely water-bound and worn in places to a very appreciable extent. The second basis was advanced by the county surveyor, Mr. Wilkin, in cross-examination, when he said that the "cost of replacing old roads in condition they were before Stewart injured them would be £2,000, in or about." He made his meaning clearer when, recalled at the close of the evidence, he said in reply to a question put to him by the learned judge "If we relaid road it would take 4,000 cubic yards—waterbound would be roughly £2,000. They (referring to defendants) presuppose darning road and patching holes—we relay the surface." In this last sentence Mr. Wilkin refers to the third suggested method of repair and principle of compensation—that advocated by the defendant. For such repair work, the defendant's witnesses gave two estimates, Mr. Boyd, the contractor, putting the figure at £225, whilst Mr. Caldwell, their engineer, thought the work could be carried out for £172 3s 2d.

No question was left to the jury as to the method of repairing the roads which the circumstances of the case in their opinion rendered necessary, and the Lord Chief Justice was not asked by either party to leave any such question. The assessment of £300 leaves, however, no room for doubt that they adopted the "darning and patching" basis. Were they justified in so doing?

In his report, the Lord Chief Justice says that he told the jury that, if the defendant caused the damage to the roads, the measure of his liability would be the cost of restoring the roads to the same condition in which they were before

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the damage was done, provided such repairs were reasonably carried out, and also subject to this, that on replacement the injured party might necessarily have to receive a new article instead of an old one, and it was open to juries on that account to make some deduction if they so desired from the amount awarded. He further told them that after the evidence of the surveyor for plaintiffs it would not be reasonable to charge the defendant the whole £4,625, which included the extra cost of replacing by tar macadam the damage to an ordinary macadam road at double the price. He also said that on the evidence replacing a macadam road could be done in one of two ways:—(a) Either by taking it up and relaying the whole surface at a cost estimated by the plaintiffs at £2,000; or (b) by filling up holes and cracks here and there described as “darning” at a cost estimated by the defendant at anything between £175 and £225. He told them that it was entirely a question for them which was the reasonable basis to adopt and at what figure. He says that he offered no opinion of his own on the question and would have been equally content with a verdict on either basis. The jury, he adds, found on the lower basis. In the opinion of the learned judge the trial was in every respect satisfactory, the jury were attentive and intelligent, and, if they took the defendant’s view that darning the roads was sufficient, the damages were not at all inadequate.

It will be observed that, in thus presenting the case to the jury, the Lord Chief Justice excluded the first and largest basis of compensation—that which was solely relied upon by the plaintiffs in their statement of claim. He did this apparently because of the evidence of their surveyor, who on cross-examination admitted that he could not say why Stewart should pay for the stronger road as distinguished from putting back the road into the same repair, and that he did not see why Stewart should be charged with the entire cost of improved roads. Mr. Wheeler, the assistant surveyor, took the same view. I would add that it is the common sense view, and that it coincides with what I conceive to be the true legal view. The plaintiffs’ counsel, who argued contra, relied strongly

upon the case of *Savin v. Oswestry Highway Board* (1). The headnote to that case sets out that Savin was the owner of locomotive engines which were used on a highway which was originally sufficient for ordinary light traffic only and was greatly damaged by the heavy traffic of the engines. The highway board were obliged, not merely to repair but to reconstruct the road, and incurred thereby an expenditure of £500. The repairs and the reconstruction items could not be severed. It was held that Savin was rightly ordered to pay the sum of £500, and that it was immaterial that his engines were made and used in accordance with the statute. In my opinion, this case has been somewhat misunderstood by reason of an abbreviated and somewhat misleading headnote which omits to state that the total expense of reconstruction of the highway was £813 10s 0d, of which the £500 was the amount attributable to the damage done by the appellant's engines and carriages. Further, the case turned largely upon the special findings of fact in the case stated, by which the court were bound, amongst which was the finding that the expenses of reconstruction could not be separated from the repairs, and that they were in fact cost of repairs. It also appears from the judgment of Lush J. that the Highway Board had found it necessary to put the road into thorough repair and that this could not be done without reconstructing it in a better and more permanent manner. In these circumstances he considered that the fact that the road was in a better condition than ever before was the inevitable consequence of the damage done by the appellant's locomotives. He emphasised the fact that the Board could not sever the one cause of expenditure from the other, and said that as this was not their fault the wrongdoer must bear that inconvenience. The decision can be supported on its special facts when it is understood that the £500 represents but a part of the total cost of reconstruction, but it is no authority for any such general proposition as is contended for here, and it entirely fails to establish the plaintiffs' right to recovery of the sum of £4,625 sued for in this action.

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The plaintiffs also rely upon the very recent case of *Southern Railway Company v. Gosport Corporation and Eddison Steam Rolling Company Limited* (1). In that case the Court of Appeal, whilst affirming the liability of the defendant corporation for damage caused to a railway bridge by reason of the negligent working of a steam roller hired by the Eddison Company to the corporation, increased the damages, assessed by Greer J. at £10, to the sum of £321 4s 10d, the actual cost of repairs. When, however, the case is carefully examined, it will be observed that the substantial increase in damages was the result, not of the application of any different principle of compensation to that acted upon by Greer J., but of the refusal of the Court of Appeal to accept the inference of fact drawn by him as to the probable duration of life of the bridge had the steam roller not caused the damage complained of. Greer J. considered that the bridge would have collapsed in any event within six months, and he, accordingly, assessed the damages at a sum which represented roughly the interest for six months on the capital sum of £321 4s 10d which had been expended on necessary reconstruction and repair. The Court of Appeal, on the other hand, considered on the facts that the bridge would have remained in its then condition for such a substantial length of time that it was quite impossible to apply the doctrine referred to for the purpose of minimising the damages, which they accordingly increased to the full sum of £321 4s 10d. This sum, no doubt, covered partial reconstruction, but it was allowed because the repair work necessarily involved reconstruction. There was no suggestion in the case that the class of work carried out in reconstruction was of a higher order than that with which the bridge was originally built. There was nothing in the new work to correspond with the substitution of tar macadam for water-bound roads. The whole case proceeded on the assumption that the work was carried out as economically as was consistent with its proving to be a sound and satisfactory job. A further distinction might be drawn between that case and the present on the different wording of section 1 (1) of The Public Roads (Ireland) Act, 1911, and section 7 of the

(1) [1926] 2 K.B. 89 and on appeal 60 I.L.T. Misc. 187

Locomotive Act, 1861; but I have already dealt sufficiently with the case to show that the decision falls far short of establishing the proposition contended for in the present case—a proposition which is in my opinion in conflict with the language of section 1 (1) of the Act of 1911, and with several cases of recognised authority.

Dealing first with the section, I would direct special attention to the use in two distinct places of the word “necessary” in connection with the word “expenses.” First, it must appear by the certificate of the surveyor that the extraordinary expenses had become necessary for the purpose of repairing the road by reason of the damage caused by excessive weight or extraordinary traffic, and, secondly, the plaintiffs must establish to the satisfaction of the court that the expenses had become necessary by reason of damage from such weight or traffic. The court will not allow the expenses merely because they have been incurred, or because they were incurred in the exercise of a wise discretion by the county surveyor, who is possibly looking to the future requirements of road traffic. The fundamental facts to be established are:—(1) that the expenses were necessary, and (2) that the damage arose from the excessive weight or extraordinary traffic complained of. Once these facts are proved, the precise nature or character of the work appears to me to be of quite secondary importance. If damage can only be repaired by reconstruction, then the plaintiffs are entitled to recover compensation on what I shall call a reconstruction basis, which, however, is not to be understood as meaning the same thing as the total cost of reconstruction. Thus the very foundations of a road may be so destroyed by such weight or traffic that the surface cannot be repaired without partial or total reconstruction of the road. If this be so, the council may, in my opinion, present their claim and recover on this basis; but the new work must be of a similar general character to the old; and they have no right, either as regards foundation or surface, to substitute a new road suitable for modern traffic for an old unclassified district road at the defendant’s expense. They cannot charge the defendant, who has damaged the surface of a water-bound road, with the cost of a tar macadamed road any more than they can charge him with the cost of a paved, a concrete, or an

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asphalte road. Admittedly, tar macadam, concrete, or asphalte provides a more permanent surface. Admittedly, in many cases, some such surface has become absolutely necessary to meet the requirements of modern traffic; but the necessity, where it exists, arises from such modern traffic and not, as it must do under the section, from the damage caused by the excessive weight or extraordinary traffic complained of. It is the duty of the road authority to keep the roads in proper condition, and, where necessary, to improve their character to cope with the requirements of modern traffic; (see the speech of Lord Atkinson in *Sharpness New Docks and Gloucester and Birmingham Navigation Company v. Attorney-General* (1) and that of Lord Haldane in *Henry Butt & Company v. Weston-super-Mare Urban Council* (2). This duty they cannot transfer to an individual whose vehicles, whilst lawfully using the roads, have caused damage which necessitates repair.

The view which I have expressed as to the expenses recoverable under the section is amply supported by authority. The Attorney-General referred us to *The Cambridgeshire County Council v. Pepper* (3), where Bray J. held that the facts—(a) that the road was initially weak in some places; (b) that some part of the traffic of the defendant's might fairly be looked upon as ordinary, and (c) that in consequence of the work carried out to make good the damage the road was in a better condition than it would have been had there been no extraordinary damage and no consequent repairs—might all be taken into account to reduce the amount payable to the road authority. The case was decided upon section 23 of the Highways and Locomotives (Amendment) Act, 1878, which is perhaps somewhat more favourable to the road authority than section 1 (1) of the Roads Act, 1911. The learned judge there pointed out, as I hold to be the fact in the present case, that it was no doubt a prudent course for the surveyor to take the opportunity to improve the crust of the road, but he could not say that under the section he was entitled to make the defendant pay for the extra expenditure.

(1) [1915] A.C. 654
(2) [1922] A.C. p. 351

(3) 76 J.P. 393

I shall only refer to two other cases in this connection. The first is *Ledbury R.D.C. v. Colwall Park Quarries Company* (1)—Scrutton J. there held that the principle to apply was to hold the defendants liable for the amount actually spent in repairing the damage done to the portion of the road actually used by the defendants over the amount which would have been spent on repairing the damage done to the same portion by traffic other than the defendants which actually used it during the period complained of. He took into account in the calculation that, as the winter was wet, the ordinary expenditure on repairs would have been higher; that the ordinary expenditure on repairs had been steadily rising for some years owing to extra burdens of traffic and higher standard of road maintenance; and also, as he found to be the case, that the road was not merely repaired but improved; and he considered that the defendants ought not to pay for betterment as distinct from repairs, or for work so far as it would lessen the ordinary cost of repairs in subsequent years. The other case—prior in point of date—is *Hemsworth R.D.C. v. Micklethwaite* (2), an authoritative decision of Alverstone C.J. and Wills and Kennedy JJ. In particular I would call attention to the judgment of Wills J. at p. 347 where he pointed out that not keeping the road in order for ordinary traffic is not an absolute answer to the claim of the plaintiffs as proving that no cause of action at all can lie in those circumstances, but it is a very essential element in the consideration of the cases, because extraordinary traffic and excessive weight must have some reference to the state of the road to which they are applied, and also that it is perfectly clear that the plaintiffs are entitled only to recover the damage done by extraordinary traffic and excessive weight by the particular person who is sued. He said that they had done in that case what one finds road authorities constantly doing—where they can sue one man they endeavour to put upon him the whole expense which has been caused both by himself and by other people; and if it comes to be a question of assessing the expenditure which ought to be charged, the fact of the road not having been kept in adequate repair for the needs of the neighbourhood, such as they had grown to be in

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(1) 77 J.P. 198

(2) 68 J.P. 345

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ordinary use, is a very important matter because "it would," he continued, "be most unjust that because the appellants have a cause of action against him, they should saddle him with the effect of their own default as well as the effect of extraordinary traffic or excessive weight which he has brought on the road."

These cases—others could be cited to the like effect—clearly establish that it is not the total sum actually spent on repair which is recoverable by the road authority, whether that repair involves reconstruction or not. Regard must be had to all the circumstances of the case, including the state of the road when the extraordinary traffic commenced, both as regards its surface and its general character and suitability for the traffic which, having regard to modern conditions, might reasonably be expected thereon. So, too, the court should consider the amount of other traffic thereon during the period of the extraordinary traffic, and, if the season be unusually wet, an additional allowance may reasonably be made in respect of same, just as a further sum may be allowed in respect of steadily increasing annual expenditure. The court should also look to see if any of the damage to the road was caused by ordinary traffic, whether of the defendant or other persons; and, further, if the court finds that the roads when repaired are in a better condition than they were when the extraordinary traffic commenced, an allowance should be made in respect of it. All such deductions are, in my opinion, necessarily implied in the words of the section, which make the party liable only for "the amount of such expenses as may be proved . . . to have become necessary by reason of the damage arising from such weight or traffic." Unnecessary expenses or expenses not incurred by reason of the damage caused by the defendant are irrecoverable.

If this be the law, as I conceive it to be, the learned Lord Chief Justice gave no misdirection to the jury of which the plaintiffs can complain when he told them, as alleged in the notice of motion, that they could only award to the plaintiffs such a sum as would be sufficient to put the roads into the same condition as they were in at the time when the defendant's excessive traffic began. It seems to me that if anyone could object to this direction it would be the defendant on the ground that, unless quali-

fied somewhat, it might be calculated to lead the jury to overlook certain legitimate deductions, such as the damage caused by all traffic other than the extraordinary traffic of the defendant. However, the more complete note which we have of the learned judge's charge in his report shows that his general direction was adequately qualified and fully explained.

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As then the plaintiffs have failed to establish any misdirection on the part of the learned Lord Chief Justice, it only remains to consider whether, on the facts proved, the jury were bound to compensate the plaintiffs on the basis of relaying the surface at a cost of about £2,000, or whether it was competent for them to accept the view that all necessary repairs could have been effectually carried out by the system of "darning." I think the answer to this question depends on a simple issue of fact, namely, whether the condition of the roads after the extraordinary traffic was such that they were capable of being reasonably restored by the "darning" method to the condition in which they were immediately before such traffic commenced; for, if they were, any additional expense incurred in relaying the whole surface was not rendered "necessary" by the defendant's traffic. The Lord Chief Justice offered no opinion to the jury as to which basis they should adopt; and, having given the correct general direction in law to the jury, he was, in my opinion, perfectly right in declining to dictate to them upon what was, as I have indicated, purely a question of fact. Further, indeed, he admits he had no opinion on the subject and he would have been equally content with a verdict on either basis. What then was the position of the jury? They had evidence both ways. The plaintiffs said in effect that ordinary "darning" repair would be wholly inadequate. The defendant, on the other hand, produced witnesses, including the plaintiffs' road contractor, Boyd, who proved that the roads could be made "as good as when the contract started" by this darning or patching method. The jury, who saw the witnesses and had an opportunity of deciding between them which is denied to us, accepted this latter view. How can we say that they were necessarily wrong when there was ample evidence to support their finding? They were evidently of opinion that surfacing and steam

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rolling these roads with water-bound macadam at a cost of £2,000 would produce roads which, generally speaking, would be far better than those which existed at the time the traffic began. On the other hand, they evidently thought that the patched article would not be quite as good; and probably for this reason, and possibly also because they thought the defendant's estimates too small, they allowed £300 as against such estimates of £175 and £225.

The jury, in my opinion, were justified in taking the view that these roads could be satisfactorily repaired for £300, without reconstruction or resurfacing, and we cannot interfere with their finding.

Perhaps I should add that I have arrived at this conclusion with some regret, for, as a juror, I have little doubt I should have estimated the damages at a somewhat larger figure; but for the reasons I have stated at such length I cannot interfere with the finding of the jury.

The plaintiffs' motion must be dismissed with costs.

BEST L.J., having stated the facts as above set out, proceeded:—

The plaintiffs' action is only maintainable if extraordinary expenses have become necessary for the purpose of repairing the road or roads by reason of the damage caused by excessive weight passing along them, or extraordinary traffic thereon, and the plaintiffs are entitled to recover from any person, by or in consequence of whose order such weight or traffic has been conducted, the amount of such expenses as may be proved to the satisfaction of the court, having cognizance of the case, to have become necessary by reason of the damage arising from such weight or traffic as aforesaid.

The distinction between excessive weight and extraordinary traffic is discussed in *Hill v. Thomas* (1), a case arising under The Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vic., c. 77), section 23, the provisions of which, on this point, are the same as those contained in section 1, sub-section (1), of the Public Roads (Ireland) Act, 1911. Applying the definition of extraordinary traffic given by Bowen L.J. to the facts

proved or admitted in the present case, there is no doubt that extraordinary traffic was conducted over portion of the roads leading from the quarries and gravel pits to Stormont, that this traffic was calculated to damage and did damage the highways and increased the expenditure on their repair, and that in respect thereof the plaintiffs are entitled to recover. This conclusion was not seriously disputed by the defendant. How are the recoverable damages to be estimated? Mr. Murphy for the plaintiffs submitted that what was done to the roads by the plaintiffs was not re-making but re-surfacing the portions damaged, that the re-surfacing became necessary by reason of the damage arising from the weight of traffic conducted over them by the defendant, and that the plaintiffs are entitled to recover either (a) the amount actually expended by them, i.e., four thousand six hundred pounds odd, or (b) the sum of two thousand pounds, more or less, mentioned by their surveyor as the cost of placing the old roads in the condition in which they were before defendant injured them.

As supporting his first contention, he cited the cases of *Savin v. Oswestry Highway Board* (1) and *Southern Railway Company v. Gosport Corporation* (2), a decision of Greer J., which on appeal was varied (3).

In *Savin v. Oswestry Highway Board* (1) the facts were that locomotive engines were used on a highway originally sufficient for light traffic only, and the highway was greatly damaged by the heavy traffic of the engines. The Highway Board were obliged not merely to repair but to reconstruct the road, and they thereby incurred an expenditure of £813 10s 0d, of which the sum of £500 was attributable to the damage done by the appellant, Savin. The repairs and the reconstruction items could not be severed, and it was held that Savin was rightly ordered to pay the sum of £500. Having stated the facts of the case Mr. Justice Lush proceeded as follows :—“ This road was apparently made for a much lighter kind of traffic till the engines came to be used. The consequence has been that the Highway Board found it necessary to put the road into thorough repair, and this could not be done without re-

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(1) 44 J.P. 766.

(2) [1926] 2 K.B. 89.

(3) [1926] L.J. 49 Misc. and
60 I.L.T. 157.

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constructing it in a better and more permanent manner. It is said that the road is now better than it ever was before. That has, no doubt, been the inevitable consequence of the damage done by the locomotives, and it seems that the Board cannot sever the one cause of expenditure from the other. That is not their fault. It must be on the wrong-doer to bear that inconvenience. Our judgment will, therefore, be for the respondent. Two important factors were present in this case — (1) the Highway Board found it necessary to put the road into thorough repair, and this could not be done without reconstructing it in a better and more permanent manner, and (2) the repair and the reconstruction items could not be severed. If the repairs could have been effected without reconstruction, it is only fair to assume that Savin would not have been ordered to pay £500."

This case is not, in my opinion, an authority for Mr. Murphy's proposition as to the plaintiffs' right to recover either of the amounts mentioned by him. In the present case there is evidence on which the jury might well act that repairs by the process of "darning" could have been carried out, and that it was not necessary to re-make, or, as Mr. Murphy would prefer to have me say, to re-surface the roads in order to effect repairs as specified in section 1, sub-section (1), of the Act.

In the *Southern Railway Company v. Gosport Corporation* and *Eddison Steam Rolling Company Limited* (1), the plaintiffs, who were the owners of a bridge which carried a public road over their railway, sued the defendants to recover the sum of £321 4s 10d which had had to expend in partially reconstructing the bridge, which had been damaged owing, as they alleged, to the joint negligence of the defendants, and in the alternative the plaintiffs alleged that the defendants were jointly and severally liable for the damage by virtue of section 7 of the Locomotive Act, 1861. The road crossing the bridge in question required to be repaired, and the defendant corporation, upon whom rested the obligation of doing the repairs, were carrying them out by means of a steam roller belonging to the defendant company, who had let it on hire, with their driver, to the defendant corporation when the damage to

[1] [1926] 2 K.B. 89 and 60 I.L.T. 187.

the bridge complained of by the plaintiffs was done. The learned judge held that the rolling of the roadway on the bridge was done in a negligent manner, that the driver of the steam roller was for the time being the servant of the defendant corporation, who alone were therefore liable for that negligence, that the damage done to the bridge at the time in question was due to that negligence, that the bridge was doomed in any case through having been weakened by the passing over it for some time of heavy vehicular traffic, and that the plaintiffs would have had to expend a considerable sum upon it before long, probably six months. In those circumstances, he assessed the damages which the plaintiffs were entitled to recover from the defendant corporation at £10. Greer J. absolved the defendant company from liability for the negligent way in which the rolling was being done and fastened that liability upon the defendant corporation, and he gave judgment against them for the sum mentioned. The plaintiffs appealed, and the judgment of Greer J. was varied with regard to the amount of the damages by substituting for £10 the sum of £321 4s 10d, the costs of repairs. Bankes L.J. said that the bridge had stood the ordinary traffic of the district perfectly well for about eighty years without any sort of trouble. It had been constantly inspected by the railway company officials and by roadmen in the employment of the Gosport Corporation, that the increasing traffic had not affected it in the least, and that in the circumstances the damage, the breaking of the parapet, having occurred owing to the negligence of those for whom the defendants were responsible, and it being proved that it had cost the railway company £321 4s 10d to repair the damage, there was no ground for reducing the damages below the actual cost.

It will be observed that the amount awarded was the actual cost of repairing the damage done. Even if the parapet had not been injured, it appears to me that damage to a roadway on a bridge passing over a railway by a heavy body such as a steam roller crossing and re-crossing the bridge is almost certain to be different in kind from, and more serious than, that done to a road by excessive weight or extraordinary traffic passing over it.

The repairs to the latter, which, using the words of subsection (1), "have become necessary by reason of the

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damage arising from such weight or traffic as aforesaid'' might be effected by patching or darning the surface where damaged, whilst damage to the roadway on the bridge or to the parapet might only be reparable by total or partial reconstruction of the bridge or parapet if a portion of the roadway were broken through or appreciably weakened, or if the parapet were damaged. The two cases are so wholly dissimilar that the measure of damages in one can be no guide in the other. Other cases were cited to us but it is not necessary, in my opinion, to examine them.

I think the learned judge's direction to the jury was right. It was essentially a question for the jury what amount of expenses had become necessary for the purpose of repairing the roads by reason of the damage done to them. The learned judge was satisfied with their appreciation of the case and the attention which they gave it, and I see no reason for disturbing the verdict and judgment.

The appeal must be dismissed with costs.

Solicitor for plaintiffs : *R. J. Dickson.*

Solicitors for defendant : *C. & J. Black.*

A. A. C.

IN THE MATTER OF ROBERT ROBINSON, EDEN ROBINSON, and
THOMAS ROBINSON, Deceased.

ROBINSON v. McFADDEN.

1925, No. 156.

PRACTICE NOTE.

Practice—Administration proceedings—Miscellaneous Costs.

Mr. Justice Wilson, on the further consideration of these matters and in dealing with the costs of the various parties, directed that in this and in all other cases where Executors or Administrators are declared to be entitled not only to their costs incurred in the proceedings but also to their miscellaneous, executors or administrators costs, the bill of such miscellaneous costs shall be lodged with the Chief Clerk for examination, and for his certificate thereon whether or not all the items therein contained have been necessarily and properly incurred in the course of the administration and are proper to be taxed as Executors or Administrators costs.

Solicitor for the plaintiff : *A. J. McClelland.*

Solicitors for the defendant : *J. A. Caruth and Owens.*

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THE TRUSTEES OF FISHERWICK PRESBYTERIAN
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Poor Rate—Exemption—Church Hall used partly for recreational purposes—Exclusive charitable user—15 & 16 Vict., c. 63, s. 16—17 & 18 Vict. c. 8, s. 2.

The respondents were owners of a church hall which was used for church purposes, including the meetings of a guild connected with the church. Among other activities of the guild, badminton was played by the members twice a week six months in the year. The Commissioner of Valuation for Northern Ireland decided that owing to this user the hall was not entitled to exemption from rating under the Valuation Acts as it was not "used exclusively for charitable purposes." The respondents appealed to the Recorder of Belfast who held that there was an exclusive charitable user of the premises which were therefore exempt from rating.

Held, by the Divisional Court (Moore L.C.J. and Brown J.), on Case Stated by the Recorder pursuant to the Valuation (Ireland) Act, 23 & 24 Vict., c. 4, sect. 10, that the playing of badminton in the hall formed a minor incident intended to assist the work of the church, and that the provision of facilities for this form of recreation, forming as it did part of the charitable scheme of the church, did not deprive the building of exemption from rating.

CASE STATED for the opinion of the High Court of Justice in Northern Ireland by the Recorder and Chairman of Quarter Sessions for the County of the City of Belfast, on the application dated the 16th day of August, 1926, of the Commissioner of Valuation for Northern Ireland.

The case stated set out the facts as follows:—

This was an appeal brought by the Trustees of the Fisherwick Presbyterian Church against the Commissioner of Valuation in respect of a valuation of £29 assessed upon the Musgrave Lecture Halls attached to the said church.

The appellants appealed on the ground that the said premises were used entirely for religious and social work in connection with the said church; that the said premises were never rented or let for profit; that they are exempt from rating, and that the said valuation was excessive and not according to law. It was, however, agreed between the appellants and the respondents that the question at issue should be confined solely to the

(1) In the King's Bench Division before Moore, C.J., and Brown, J.

grounds of appeal in so far as they affected the question of exemption.

It was contended by the respondents that the premises not being used exclusively for charitable purposes were not exempt and they relied on the Poor Law (Ireland) Act, 1 & 2 Vict., c. 56, sect. 63; the Valuation (Ireland) Act, 15 & 16 Vict., c. 63, sections 16 and 17, and the Valuation (Ireland) Act, 17 & 18 Vict., c. 8, sect. 2.

The Rev. John Waddell, the minister of the said church, gave evidence on behalf of the appellants as to the description and user of the said premises, and on his evidence the following facts were found:—

The group of buildings used in the carrying on of the work of the Fisherwick congregation are intercommunicating and comprise the following:—

The church, the major hall, the minor hall (the use of which has given rise to this dispute), the church parlour, the church kitchen, the class room.

These are all used continually as required for church work, and the minor hall in particular is used for:—

One week night prayer meeting; two children's missionary societies; all kinds of congregational meetings; pre-communion services; Sunday schools; guild meetings as hereinafter described.

The guild is a society of young people belonging to the congregation which holds meetings periodically for debates, reading of papers, etc., and for the playing of badminton. It consists of one hundred members. The hall is used during six months of the year, two or three times a week for the playing of badminton by members of the guild, and the fittings necessary for this purpose are erected in the hall when required. A subscription of ten shillings per annum was formerly charged to each member of the guild who played badminton, but no subscription is now charged. Of the hundred members of the guild, seventy play badminton. On one or two occasions badminton matches have been played with other clubs in the hall, but no admission fee is charged. The upkeep of the hall, as of the rest of the group of buildings, was borne by the congregation.

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The Recorder held that:—(1) The word charitable should be construed in the wider sense and therefore included trusts for the advancement of religion; (2) that the user for badminton was a very small part of the user of the hall and that in practice it ought to be neglected; that the user in this case was for the advancement of religion and was part and parcel of the work of the church and (if the badminton user must be taken into consideration) none the less so because part of the user was recreation; (3) that the user did not cease to be exclusively charitable by reason of any subscriptions charged, and accordingly he ruled that the premises ought to be shown as exempt from rating in the lists of the Commissioners of Valuation.

The question for the decision of the Court is whether the premises are to be deemed exempt from all assessment under section 2 of the Valuation (Ireland) Act, 17 & 18 Vict., c. 8, section 2.

MacDermott for the Commissioner of Valuation:—

To entitle premises to exemption it is not enough that a substantial amount of charitable work is carried on; there must be an exclusive user. Can it be argued that badminton is a charitable object? If not, is there exclusive charitable user of the premises? Where a statute is plain and unambiguous, full effect must be given to it without regard to the consequences: *Craies on Statute Law*, p. 83. The word “exclusive” is to be given its natural meaning, *The Guardians of Wateford Union v. Barton* (1) and *The Commissioner of Valuation v. O’Connell* (2).

The Recorder has not found an exclusive charitable user, but has found that the hall is used partly for recreational purposes. The test is the actual user of the premises from day to day and is not determined by the persons who use them. There is no case that decides that the playing of games is for the advancement of religion. If the provision of a hall for the playing of badminton is “charitable,” in the present case, it must be so in the sense that objects for the furtherance of religion are charitable. Because there is here a user by the congregation it is not necessarily a charitable user. To say it is to be exempt

(1) [1896] 2 I.R. 538

(2) [1906] 2 I.R. 479

because it is an organisation carried on by a church might carry one anywhere.

[The following cases were also referred to: *Rex v. Recorder of Belfast* (1) and *Commissioners of Income Tax v. Pemsel* (2).]

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Pringle K.C. and *Ellison* for the Trustees:—

The Recorder has found that for half a year there is a small user of the church hall for the playing of badminton. The user is small enough to justify the application of the doctrine *de minimis non curat lex*. To decide in favour of the appellants would be very noxious to church activities: it would forbid the opening of church halls in poor districts to children in holiday times. Badminton promoted by a church guild is part of the religious and social work of a congregation. The user of the hall for recreation is subsidiary and does not affect the main charitable user. To say that "exclusive" forbids anything except religious exercises is to press too far, *Clancy v. Commissioner of Valuation* (3). In *Shillington v. Portadown Urban District Council* (4) it was held that a gift to a town band was a good charitable gift since it was for the benefit of the town and neighbourhood. User for charitable purposes is on the same footing as a trust. If you get a user where everything except one small item is a good charity, you must count in that item.

MacDermott in reply.

In *Clancy v. Commissioners of Valuation* (3) the non-charitable user was to raise money for charitable purposes. Not so here. There is no evidence that the playing of badminton results in the furtherance of religion. It is absurd to argue that simply because there is connected with a church an organisation for recreation, that the organisation must be charitable. *Shillington v. Portadown Urban District Council* (4) does not apply here; in every case the user must be looked to; here there is a non-charitable user that cannot be ignored.

(1) [1913] 2 I.R. 439

(2) [1891] A.C. 531

(3) [1911] 2 I.R. 173

(4) [1911] 1 I.R. 247

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MOORE, L.C.J. This appeal comes before us by way of Case Stated from the Recorder of Belfast. The question for our decision is: whether the premises, the subject matter of this appeal, are to be deemed exempt from all assessment under section 2 of the Valuation (Ireland) Amendment Act, 1854. It was admitted that if the premises are used solely for charitable purposes, they are so exempt.

In the present case the precise form of charitable purpose for which the buildings are used is the advancement of religion. The actual premises with which we are concerned is a hall, known as "The Minor Hall." During the week this hall is used for one week-night prayer meeting, two children's missionary societies' meetings, all kinds of congregational meetings, pre-communion services, Sunday schools, and guild meetings. The guild is a society of young people belonging to the congregation of the church, and during the winter months they hold meetings periodically for their own education and amusement, which includes debates, reading of papers, and the playing of badminton. This may happen two or three times a week during the winter months.

It is urged by the Commissioner that because the members of the guild play badminton during the winter months in the hall, the purposes for which the hall is dedicated thereby cease to be religious, and, therefore, no longer charitable, and are deprived of exemption from assessment.

It will be noted that the trustees of the congregation who hold the hall for all these purposes do not sub-let the hall, but are themselves in possession for the whole period; whatever is done in the hall is presumably by their licence. In my opinion, when the young members of the guild play badminton on these occasions they do not secularize the building so as to deprive it of its general character of being charitable. This form of recreation is all devised as part of the organisation of the guild to attract the young people of the congregation and bring them together, and the guild is itself part of the church organisation to strengthen and further the purposes of the church. I think there was sufficient evidence before the learned Recorder to enable

him to decide as he did. In *Clancy v. The Commissioners of Valuation* (1), it was held that where a hall was used for admittedly charitable purposes its right to exemption would not be affected by incidental concerts and theatrical performances, or even by small payments made by persons directly within the charitable object. In *Shillington v. Portadown Urban District Council* (2) the provision for a quinquennial dinner, which no one could argue is itself a legal charity, was held to be valid because it formed part of the charitable scheme and was designed for the better working of the whole scheme.

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In my judgment the playing of badminton in this hall forms a minor incident intended to assist the work of this church, and the provision of facilities for this form of recreation, forming as it does part of the charitable scheme of the church, should be treated as though it were a charitable purpose, and the building is therefore exempt from assessment. The question in the Case Stated will be answered accordingly.

The trustees are entitled to their costs.

BROWN J. I concur, and for the reasons stated by the Lord Chief Justice, and I only wish to add a few words.

The objection taken by the Commissioners of Valuation is that the user of this church hall for the playing of badminton is not for the advancement of religion. Now there can be no doubt that the whole conception of the nature of religious work has changed in the last fifty years. Until recent years the organisation of church guilds was never thought of, but ideas have changed. It is no longer thought that religious work is sufficiently provided for by church services. It is generally admitted that a church is crippled without a hall, and most churches now have a hall in which church work other than religious services can be carried on. Most churches have a guild with the object of getting and keeping the young people together, interesting them in the work of the church and tying them, as it were, unofficially to it. At the guild meetings the minister of a congregation is enabled to meet the young people, get to know them and they him as could not be possible if the guild or some similar organisation did not exist.

(1) [1911] 2 I.R. 173

(2) [1911] 1 I.R. 247

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In my opinion, the Recorder's decision was an admirable one. If this is not regarded as a case in which the maxim *de minimis non curat lex* applies, it is certainly one in which the user of the church hall for recreation and games, must be regarded, from the viewpoint stated above, as part of the religious work of the church: such a user is in the true sense charitable, and for the advancement of religion. There has been nothing done to deprive the hall from exemption and this appeal must be dismissed.

Solicitor for the Commissioner of Valuation: *J. H. B. Gunning.*

Solicitor for the Trustees of Fisherwick Church: *Martin H. Turnbull & Co.,*

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NORTHERN IRELAND LAW REPORTS.

SPROULE v. TRIUMPH CYCLE CO., LTD. (1).

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Dec. 15

(1925. No. 1150.)

Express Guarantee—Express exclusion of Warranty—Agency—Sale of Goods Act—1893 (56 & 57 Vict. c. 71) s. 14.

The plaintiff entered into negotiations with one C. for the purchase of a motor bicycle manufactured by the defendant company. At the first interview C. gave to the plaintiff a booklet issued by the defendant company called "Hints," containing certain working directions necessary for the smooth running of the particular machine, and alleged that he had at the same time handed to the plaintiff a catalogue of the defendants which contained an express guarantee which excluded "the guarantee implied by statute or otherwise as to the quality or fitness of such machines for the purpose of motor cycling." C. was described as motor agent and acted as agent of the defendant company, but at the foot of the guarantee in their catalogue it was stated that "the term agent is used in a complimentary sense only and those firms whom we style our agents are not authorised to advertise, incur any debts or transact any business on our account, other than the sale of goods which they may purchase from us; nor are they authorised to give any warranty or make any representation on our behalf other than those contained in the above guarantee."

The plaintiff subsequently purchased through C. a motor cycle of the defendants' manufacture, and the form of guarantee furnished with the machine stated that "we guarantee only those machines which are bought either direct from us or from one of our duly authorised agents, and under no other conditions."

The machine proved defective, and the defendant in an accident thereby caused suffered serious injury to his leg.

The plaintiff sued the company for damages, relying upon (a) the implied condition under the Sale of Goods Act, 1893, section 14; (b) the purchase of the machine from the defendant company through their agent C. The defendants alleged that the cycle had been sold by them to C., who resold it to the plaintiff. At the trial the jury, accepting the evidence of the plaintiff that he had not got the catalogue, found that in the sale of the motor cycle C. was agent for the defendants and awarded the plaintiff £1,200 damages.

On motion for a new trial it was *held* by Moore L.C.J., Andrews and Best L.JJ. that there was a sale by the defendant company to the plaintiff through their agent C. without any limitation of liability, that the implied warranty under section 14 of the Sale of Goods Act, 1893, came into force, and the defendant's warranty never applied.

NEW TRIAL MOTION. This action, which was tried before Brown J. and a special jury of the County of Londonderry

(1) In the Court of Appeal before Moore, L.C.J., Andrews and Best, L.JJ.

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on 5th August, 1926, was brought for breach of warranty in the sale of a motor cycle.

The facts were as follows :—

The defendants were a motor cycle manufacturing company with their principal place of business at Coventry.

The plaintiff, a member of the Royal Ulster Constabulary, wanted a motor cycle to ride for pleasure and also on duty. He went to a Mr. Cameron, of Ballymena, who carried on the business of a cycle agent. The plaintiff saw in Cameron's place a model P. Triumph cycle. There was some discussion between the plaintiff and Cameron not only in regard to a Triumph cycle, but also concerning another make of motor cycle. Cameron gave him a postcard and asked him when he had made up his mind to send the postcard to him. Cameron also gave him a booklet published by the Triumph Motor Cycle Company "Hints and Tips to Motor Cyclists."

The plaintiff subsequently sent back the postcard to Cameron stating that he had decided to purchase a Triumph motor cycle. Cameron acknowledged the postcard and said that he had sent on the order to the Triumph Company. The plaintiff went on 28th March to Cameron's place at Ballymena, received the motor cycle, and paid the sum of £40 13s 0d, and on 28th March he got a receipt for that amount. At the trial, plaintiff denied that he was given a Triumph catalogue, though Cameron, who was a witness for him, stated in his evidence that with "Hints" and the postcard he handed plaintiff such a catalogue. Cameron also stated in his evidence that he had been "agent" for the defendants for nineteen years. At the time that the plaintiff received the machine a brown envelope was attached to the front forks. Cameron pulled it off and handed it to the plaintiff, saying "This is your guarantee and running instructions." The plaintiff put the brown envelope in his pocket and read it the next day in barracks. The catalogue also contained the "guarantee." The Triumph "guarantee" contained (inter alia) the following terms :—

"We give the following guarantee with our motor cycles, motor cycle combinations and sidecars, instead of

the guarantee implied by statute or otherwise, as to the quality or fitness of such machines for the purpose of motor cycling; any such implied guarantee being in all cases excluded. In the case of machines which have been used for "hiring out" purposes, or from which our trade mark or manufacturing number has been removed, no guarantee of any kind is given or to be implied.

"We guarantee, subject to the conditions mentioned below, that all precautions which are usual and reasonable have been taken by us to secure excellence of materials and workmanship, but this guarantee is to extend and be in force for three months only from the date of purchase."

The guarantee contained other terms not material to this report and proceeded:—

"We guarantee only those machines which are bought either direct from us or from one of our duly authorized agents, and under no other conditions.

"The term 'agent' is used in a complimentary sense only, and those firms whom we style our agents are not authorized to advertise, incur any debts, or transact any business whatever on our account, other than the sale of goods which they may purchase from us; nor are they authorized to give any warranty or make any representation on our behalf other than those contained in the above guarantee."

On 25th April, 1925, the plaintiff, who had gone on the cycle so purchased for a run from Cushendall to Belfast, on his way back from Belfast was suddenly thrown from the machine, sustaining very severe injuries. This accident was caused by defective construction, a portion of the brake on the front wheel, which became detached and fouled the front wheel, suddenly checking and upsetting the machine.

In consequence of the injuries he received the plaintiff was on 6th October, 1925, discharged as unfit from the Royal Ulster Constabulary.

The booklet entitled "Hints" contained the following:—"Triumph Service." "This has been inaugurated to meet every need of the Triumph owner, and has proved a great boon to riders throughout the country. It is a service which not only anticipates your every need, but is watchful of your interest, commencing with the purchase

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of the motor cycle and continuing for as long as the machine is on the road.

A regular chain of service agents linking up every part of the country has been created, and in addition Triumph agents—who number well over 1,000 located throughout the British Isles—are ready to render help wherever the rider is touring or domiciled. Moreover, the Triumph Headquarter Service Department is always at the call of the Triumph owner, ready to advise and render help.”

At the trial, on cross-examination, Cameron produced an agreement of 44th December, 1924, entered into between him and the defendants, by which Cameron was appointed the “agent” of the company.

The following terms were amongst those contained in this agreement:—

“1. The company will sell to the agent during the term of this agreement Triumph motor cycles and combinations for sale in the territory allotted to him.

“3. The agent agrees to purchase and to pay for in accordance with the terms of business as set out on page four of this agreement not less than 30 motor cycles and combinations between September 1st, 1924, and August 31st, 1925, and monthly deliveries of these machines shall be given by the company and taken by the agent as per schedule attached to this agreement. The prices to be paid by the agent and the terms of sale shall be those from time to time fixed by the company.

“8. The agent undertakes to strictly maintain at all times such retail prices, both for cash and hire purchase, as will be fixed from time to time by the company either by advertisement or otherwise, and to strictly adhere to the terms set out in the company’s prospectus dealing with the sale of their machines on the hire purchase system, and not to make any deviation therefrom either in the way of increase or decrease of price or smaller deposit and extended terms in the case of hire purchase without having first obtained the written consent of the company.

“9. The agent agrees to supply other agents within his district on the following terms (set out).

“11. The agent will not sell or offer for sale to any dealer any Triumph motor cycle or combination outside his district or for export without having obtained previously the company’s consent, or to any dealer or agent within his allotted territory without obtaining from such dealer or agent a written agreement that he will observe the conditions of re-sale contained in this agreement.

“16. The agent declares that he has duly perused the form of guarantee or limited warranty, and the definition of the term ‘agent’ in the company’s catalogue and agrees to such limitation of warranty and authority.

“17. The agent agrees not to sell or offer for sale for use on or in connection with the manufacturers’ motor cycles and sidecars (whether new or second-hand) spares or replacement parts which have not been manufactured or sold by the company.

The statement of claim set out that the motor cycle was purchased from the defendant company through their agent Cameron in Ballymena by the plaintiff; that the motor cycle was purchased for the purpose of being ridden by the plaintiff and was bought by description, and that it was an implied condition of the contract of sale that the motor cycle was reasonably fit for the purpose for which it was required, and that it was also an implied condition of the sale that the motor cycle should be of merchantable quality; that the motor cycle was not reasonably fit for the purpose and was not of merchantable quality, but was in fact and in breach of the implied conditions defective and unsafe.

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The defendants by their defence denied that the motor cycle was sold by them to the plaintiff, but asserted that they sold the motor cycle to Cameron who, in turn, resold it to the plaintiff. They pleaded also that Cameron was only their agent to the extent that he could give the plaintiff a limited guarantee on their behalf in a special form authorized by them and not otherwise. They also set up by their defence this form of guarantee as preventing the application of section 14 of the Sale of Goods Act, 1893, and alleged that in performance of such guarantee their only liability was within a period of three months to replace defective parts, which they had done.

The case for the plaintiff having closed, counsel for the defendants asked for a direction on the following grounds:

1. That the defendant company did not sell the motor cycle to the plaintiff.
2. That in any event the liability of the defendant company was limited by their guarantee to a replacement of defective parts.
3. That this had been fulfilled.
4. That there was no evidence that the accident was occasioned by any defect in the machine.

The learned judge declined to direct, and left to the jury the following questions, to which their answers are here given:—

1. Was the motor cycle bought by the plaintiff by description? [Answer, yes.]
2. Was W. Cameron in the sale of the motor cycle the agent of the defendants? [Answer, yes.]

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3. Did the plaintiff make known to W. Cameron the particular purpose for which the motor cycle was required so as to show that he relied on the defendants' skill and judgment? [Answer, yes.]

4. Was the motor cycle reasonably fit for the purposes for which it was required? [Answer, no.]

5. Was the motor cycle when sold of merchantable quality? [Answer, no.]

6. Were the terms of the written guarantee (or warranty) made part of the contract of sale of the motor cycle? [Answer, no.]

7. Was the accident caused by a defect in the front brake of the said motor cycle? [Answer, yes.]

8. Damages? [£200 for past expenses, pain and suffering, £1,000 compensation.]

The Attorney-General on behalf of the defendants objected to all the questions.

The learned judge gave judgment for the plaintiff for £1,200 in accordance with the findings of the jury, staying execution until second day of Michaelmas sittings.

Counsel for the defendants now moved for an order that the verdict and findings of the jury and the judgment entered thereon be set aside, and judgment entered for the defendants, on the grounds :—

(a) That on the evidence the motor cycle was sold to the plaintiff by Cameron and that there was no evidence proper to be submitted to the jury that Cameron sold the motor cycle as agent of the defendants and that the answer of the jury to question No. 2 was without evidence and against the evidence and the weight of evidence and that this question should not have been submitted to the jury.

(b) That there was no evidence to support the findings of the jury in answer to questions 1, 3, 4, 5 and 6, and that their findings were against the evidence and the weight of evidence, and that these questions should not have been submitted to the jury.

(c) That the finding of the jury in answer to question No. 7 was without evidence and against the evidence and the weight of evidence.

(d) That the learned judge misdirected the jury by telling them that it was open to them to find for the plaintiff upon the questions submitted.

(e) That the learned judge was wrong in submitting all or any of the said questions to the jury and in refusing to accede to the application of the defendants' counsel for a direction at the close of the plaintiff's case.

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A. B. Babington K.C. (Attorney-General), Beattie K.C. and McKean for the defendants :—

We submit that this machine was not sold by the defendants to the plaintiff at all. There was no contract whatever between the Triumph Cycle Company and the plaintiff; Cameron was not the agent of the defendants in the sale of this machine, which became the property of Cameron. In law and in fact Cameron was not an agent for the Triumph Cycle Company. He was merely an agent to pass on the guarantee, but for no other purpose. Cameron could have resold the motor cycle with any guarantee, so as to bind himself. There was no privity between the defendant company and the plaintiff. The plaintiff in his evidence states that he bought the motor cycle from Cameron; he makes no suggestion that he thought he was dealing with the Triumph Cycle Company. We submit that the plaintiff must take Cameron's evidence as a whole, and that so far as the plaintiff is concerned Cameron was the principal. No question was left to the jury suggesting that the plaintiff had been in any way misled. There was no estoppel. There was a concluded contract between Cameron and the Triumph Cycle Company. We submit that the guarantee was passed on by Cameron, on behalf of the defendants.

If Cameron was agent of the defendants, he was so only to the extent of the limited guarantee. The case was allowed to go to the jury without these two submissions having been properly considered. The learned judge was wrong in leaving to the jury the question "Was Cameron in the sale of the motor cycle the agent of the defendants? The finding of the jury on the question of agency cannot stand. The question of agency is one of law, the facts being conceded. The jury's finding that the guarantee was part of the contract was wrong. The whole weight of the evidence was to the effect that the plaintiff got the catalogue.

In the present case any implied condition is excluded by the guarantee. This limited guarantee is in law a com-

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plete protection to the defendants. If the property passed to Cameron on the sale then all the other questions are out of the case. *Baldry v. Marshall* (1) does not apply in principle to a case of an implied condition.

The subject matter of the sale could not have been sold by the defendants to the plaintiff, as the property had already passed to another person. There is no evidence of a sale from the defendant company to the plaintiff. Before the plaintiff was ever heard of by the defendants this particular machine had been ordered by Cameron.

The implied conditions as to quality and fitness are expressly excluded. The learned judge should have directed a verdict for the defendants.

E. S. Murphy K.C. and *MacDermott* for the plaintiff :—

The documents are not the only determining factor in the case. In *Thompson v. Reynolds* (2) the Court held that in deciding question of agency regard must be had to all the circumstances of the case.

In the “Foreword” issued by the defendants there occurs this passage :—“A regular chain of service agents See passage quoted, ante p. . . That is to say the company announce that they have got service agents and also over 1,000 agents. Cameron was clearly entitled to describe himself as agent for the Triumph Cycle Company. That was shown to be a correct description by the very document on which the defendants rely.

The onus of proving agency was shifted by the evidence given on behalf of the plaintiff. By the first clause of the agency agreement Cameron was in terms constituted an agent. The agent was a mere conduit pipe to convey the property. This agency agreement is from beginning to end a mere device, and it is not watertight. Clause 16 was introduced specifiially with the avowed object of limiting what would otherwise be the agent’s authority. We do not concede that the guarantee was part of the contract. This guarantee was a mere nudum pactum. There could not in law be a guarantee of this character from a person who was an antecedent vendor. Any person purchasing from Cameron seeking to rely on the guarantee would immediately be faced with the difficulty where is the consideration. The defendants rely on this guarantee for the

purpose of cutting down their own agent's authority.

The facts in the present case resemble those in *Williamson v. Rover Cycle Company, Ltd.* (1).

In principle there is a vital distinction between "condition" and "warranty." See *Wallis, Son & Wells v. Pratt & Haynes* (2), and especially the judgments of Lord Alverstone C.J. pp. 396—399, and Lord Shaw of Dunfermline 399—400. The decision in *Baldry v. Marshall* (3) was based on *Wallis, Son & Wells v. Pratt & Haynes* (2). *Baldry v. Marshall* (3) was a case not of an express but of an implied condition.

Even were it established that this guarantee was part of the contract, if there was a sale by an agent the provisions of section 14 (1) of the Sale of Goods Act, 1893, were not excluded. No Court should assist in the exclusion of the Sale of Goods Act, 1893, unless the most precise terms have been used.

In *M'Entire v. Crossley Bros.* (4) Lord Herschell said at p. 443 "No doubt any provisions which were inconsistent with the intention that the property should not pass would be given effect to in preference to a mere expression of intention in words—that is a proposition which I should not dispute for a moment; and if the appellants could have pointed here to any provisions in this deed inconsistent with the intention that the property should remain in the vendors, I think they might very likely have succeeded, notwithstanding that the parties had in terms said what their intention was." The Court has to look to the conduct of the parties and the circumstances of the case. This case cannot be governed by a single sentence such as a statement by Cameron that he had purchased the motor cycle, which is inconsistent with the agreement and the circumstances of the case. Cameron was an agent for sale, and was entitled to give a limited guarantee. The defendants by the agreement restricted their agent's authority to the giving of a limited guarantee, and cannot now say that Cameron was not an agent to pass on the implied conditions under the Sale of Goods Act, 1893.

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(1) [1901] 2 I.R. 189
(2) [1911] A.C. 394

(3) [1925] 1 K.B. 260
(4) [1895] A.C. 457

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On the terms of the agreement the motor cycles are forwarded to Cameron to sell, and he was authorized to pass on the limited warranty to the plaintiff. If Cameron failed to do so, we submit a contractual relationship between the defendants and the plaintiff was established, and the provisions of section 14 of the Sale of Goods Act, 1893, applied.

Babington K.C. (Attorney-General), in reply :

Cur. adv. vult.

Dec. 15

MOORE L.C.J. : This action was brought by the plaintiff claiming damages against the defendant company for breach of warranty in the sale to him of a certain motor bicycle.

The statement of claim sets out that the motor bicycle in question was purchased from the defendant company through their agent Cameron in Ballymena by the plaintiff.

The plaintiff alleged he was injured owing to defects in the machine contrary to warranty.

The defence denies that the motor cycle was sold by them to plaintiff but asserts that the defendants sold the motor cycle to Cameron who, in turn, resold it to the plaintiff: that Cameron was only agent for the defendant company to the extent that he could give the plaintiff a limited guarantee on behalf of the defendants in a special form authorised by them and not otherwise. The defence also sets up this form of guarantee as preventing the application of section 14 of the Sale of Goods Act and alleged that in performance of such guarantee the only liability of the defendant company was within a period of three months to replace defective parts which in the present case they had done.

The action was tried before Mr. Justice Brown and a special jury of the County of Londonderry at the Summer Assizes in Derry on 5th August last.

The plaintiff deposed to the circumstances in which he purchased the motor cycle from Cameron, and Cameron was himself called on the same subject: several documents and letters were put in evidence.

The remaining witnesses referred to the incidents connected with the accident to plaintiff.

At the conclusion of the plaintiff's case the Attorney-General (for defendants) requested the learned judge to direct a verdict for the defendant company on the grounds which have been already set out. The defendant company have served notice of motion that the verdict of the jury and the judgment entered thereon be set aside and that judgment be entered for them.

In my judgment the case really resolves itself into an inquiry as to how far there is evidence sufficient to support the finding of the jury in reply to question 2 that Cameron in the sale of the motor cycle was agent for the defendant company.

It was proved at the trial that Cameron has been agent for the defendants for nineteen years. I do not say that the word "agent" in this evidence necessarily implied more than "representative," but the jury taking it in connexion with the other evidence in the case were entitled to place their own construction on it.

The defendant company issue literature directed to the potential purchasers among the public. One of these productions is entitled "Hints." Cameron gave "Hints" to the plaintiff, and though there is no evidence that the plaintiff read the particular portion to which I refer yet it contains the following:—

His Lordship read the passage set out at p. 85.

This is a statement by the defendant company that they have well over one thousand Triumph agents in the British Isles. There is no reason why the jury should not have come to the conclusion on the evidence that Cameron was one of such agents.

The plaintiff probably was aware that Cameron, as was proved, was the only person able to sell Triumph bicycles in the Ballymena, Cushendall and Toome districts. Cameron, on his cards and on the literature of the defendant company which he distributed for them, describes himself as "motor agent," and I think that there is no doubt that he acted generally between himself and his customers as agent of the Triumph Company. The defendants, however, say that though they may have styled him with others "agent" that by such a term they do not mean agent in the ordinary, but in a merely "complimentary,"

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sense, the precise meaning of which was not intended to be defined. This statement is proved in their catalogue at the foot of the page containing the "Triumph guarantee," and is in the following words:—

"The term 'agent' is used in a complimentary sense only, and those firms whom we style our agents are not authorised to advertise, incur any debts, or transact any business on our account, other than the sale of goods which they may purchase from us; nor are they authorised to give any warranty or make any representation on our behalf other than those contained in the above guarantee."

The jury found, accepting the evidence of the plaintiff (who said that he had not got the catalogue), that the written guarantee of which the foregoing definition of agent formed part was not part of the contract. It is true that this was repeated in a green ticket or card handed to plaintiff in an envelope after payment for and delivery of the motor cycle but he did not see it at the time, and this is also covered by the answer of the jury to question 6.

Taking, therefore, the case by stages, I am of opinion that there was sufficient evidence in the circumstances to justify the jury in finding that Cameron was the defendant's agent. Similarly the jury so found in *Williamson v. Rover Cycle Company* (1)—a case very like the present in many respects, especially in the corresponding definition of the word "agent" (see p. 194). There was considerable argument on other topics on the new trial motion in that case, but the finding of the jury, that Mr. Gass was agent for the defendants in the sale of the bicycle, was never questioned.

Tracing the facts I hold that plaintiff was dealing with Cameron as the district agent of the defendant company and no suggestion of any contrary state of facts was made to him. The offer to sell the motor bicycle was made to the plaintiff verbally by Cameron on the 13th, and the contract was made by the plaintiff's postcard to Cameron of 14th February. "I will take same as soon as you get it," which, of course, means as soon as you get it from the Triumph people. In my opinion that was a contract binding the defendants to supply plaintiff on a contract made by their agent.

The defendants have an answer to this which I will now examine. In the letter of 31st December, 1925, Messrs.

Goate & Bullock state that the Triumph Company never sold the plaintiff a motor cycle at all. It appears that by an agreement of 4th December, 1924 (not within the knowledge of the plaintiff at the time of the contract) the defendants appointed Cameron their agent for the district mentioned. The first clause provided that the company will sell to the agent during the term of this agreement motor cycles and combinations for sale in the territory allotted to him. By clause 3 the agent agrees to purchase and to pay for not less than 30 motor cycles, etc., up to August 31st, 1925, etc. By clause 16 "the agent declares that he has duly perused the form of guarantee or limited warranty and the definition of the term 'agent' in the company's catalogue and agrees to such limitation of warranty and authority."

The invoice to Cameron, dated 16th February from the defendants, is relied on as a sale by the defendant company to Cameron, as indeed in form it is, and I would gather that on the preceding 9th February Cameron had sent the defendants his cheque for the price of the motor cycle which subsequently became the plaintiff's. Accordingly in paragraphs 1 and 2 of the defence defendants deny any sale by them to plaintiff, but allege that they only sold to Cameron. It was on this transaction that the Attorney-General based his first requisition at the trial for a direction—"That the defendants did not sell the motor cycle to the plaintiff"—and this contention has been strongly pressed upon us in this court, and the Attorney-General says further that if the property in the machine passed from the defendant company to Cameron, under their dealings with him, they would not be liable as sellers to the plaintiff for any implied warranty, but that the plaintiff should have sued Cameron as the real vendor to whom the motor cycle belonged, and no one else.

To my mind this, on the facts proved, is irrelevant. I have held that there was evidence on which the jury were entitled to hold that the plaintiff contracted with the defendants, through Cameron as their agent, for the purchase of the cycle. If that was the contract, it cannot be modified or changed subsequently without the plaintiff's knowledge or consent especially to his disadvantage. To bind the plaintiff Cameron should distinctly have told him prior

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to the completion of the contract that he, the plaintiff, was buying the machine from him personally and not from him as agent for the company. The principle of *Edmunds v. Bushell* (1) applies, where contracts of an agent ostensibly carrying on business so far as they were incident to the ordinary conduct of the business were upheld (and here under his agreement Cameron was only to re-sell) and such liability to the rest of the world cannot be restricted by any private agreement between the principal and agent. In *Watteau v. Fenwick* (2) where *Edmunds v. Bushell* (1) was approved Wills J., at pp. 348—349, in the judgment of the Court observed—"the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority."

I am of opinion that this alteration of the plaintiff's original contract, though perfectly regular as between Cameron and the defendant company, was irregular as between Cameron and plaintiff and was not binding upon plaintiff, and that his original contract stood. This, I venture to think, is good sense as well as good law, otherwise the plaintiff is in an impossible position. When he sues the Triumph Company they say the property is in Cameron and if the guarantee under the Sale of Goods Act, 1893, attaches, it is to the sale by him to plaintiff and not to the sale by the company. If the plaintiff sues Cameron and the jury again find that he was agent for a disclosed principal (the Triumph Company) he escapes. Where the parties are so closely and inter-dependently associated as Cameron and the Triumph Company are in the present case, I do not think it necessary to inquire, as against a bona fide purchaser, too minutely under which thimble the legal pea may at a particular stage be, and though it is not necessary for me to decide it in this case very little evidence would suffice to satisfy me that though the arrangements between Cameron and the Triumph Company are strictly in form sales and purchases for re-sale in which the vendors alone fix prices for re-sale, and, so to speak, discounts take the place of commissions, yet in fact this is a perfectly legitimate device to obscure the intentions of the parties which

(1) L.R. 1 Q.B. 97

(2) [1893] 1 Q.B. 346

are really based on the relations of principal and agent in a more than complimentary sense, so as to free the defendant from all the obligations incident to a direct sale to a purchaser from among the public.

The company by their warranty in their catalogue purport to the purchaser to contract for a very limited liability within the Sale of Goods Act, 1893. But if in truth and in fact they have already sold the machine to the agent from whom the purchaser buys it there is no privity between them and the purchaser at all, and no occasion for such a contract. Of course it is quite logical on the basis that Cameron was merely the agent as claimed by the plaintiff.

In *M'Entire v. Crossley* (1) Lord Watson says of an agreement at p. 467—"Although the words 'lessors' and 'hirers' are used and the word 'rent' also occurs, it is perfectly plain that the agreement is one of sale and purchase, and nothing else."

If, as I consider, there was a sale by the defendant company, through their agent Cameron without any limitation of liability, the implied warranty under section 14 of the Sale of Goods Act, 1893, came into force and the defendant's special warranty never applied. This the jury found in their answer to question 5. I think the action was rightly brought, and that there was evidence to sustain the findings of the jury, that there was no misdirection by the learned judge, and that this appeal must be dismissed with costs.

ANDREWS, L.J. : I agree with the Lord Chief Justice in the conclusions which he has expressed in his judgment.

The question whether Cameron in the sale of the motor cycle was agent of the defendants is a question of fact to be determined on all the circumstances of the case, including the agreement of 4th December, 1924. This document is strongly relied upon by counsel for the defendants, as it is called an "Agreement for the sale of Triumph Motor Cycles," and clause 1 provides for the sale by the company to Cameron and clause 3 for the purchase by Cameron from the company of motor cycles and combinations as therein specified. But closer examination shows that on the vital question of whether Cameron is a purchaser or merely an agent for sale the agreement is full

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of conflicting terms and provisions. Thus, an introductory clause or heading refers to the "motor agency" as distinct from the "bicycle agency." Throughout the document Cameron is referred to as "the agent," even in those clauses in which the company purport to "sell" to him and he to "purchase" from them. The other special features of the agreement are the allotment to Cameron of a fixed territory for sale; that the prices to be paid by Cameron are not fixed but variable and are determinable by the company; and that, whilst no damages are payable for delay or failure in delivery, Cameron is under obligation to pay £2 for each motor cycle or combination of the thirty specified which he does not accept. The retail prices which must be maintained by Cameron are likewise variable and determinable by the company. Cameron further agrees to supply other agents in his district who are referred to as "sub agents." There follow prohibitions against sale to persons outside Cameron's district, and a declaration by Cameron that he has perused the form of guarantee or limited warranty and the definition of the term "agent" in the Company's catalogue, and agrees to such limitation of warranty and authority. From the "Terms of Business" annexed to the agreement it appears that Cameron is paid by means of certain so-called "discounts" and "rebates" from catalogue prices; and it is, in my opinion, not unimportant to note that both the special discount and rebates are dependent on the number of machines taken by Cameron during the year; so that if the reality of the transaction be, as the defendant company allege, a sale by them to Cameron, the actual purchase price for each machine is incapable of definite ascertainment until the close of the year. Finally, the schedule of monthly deliveries contains a footnote that the agent reserves the right to revise the schedule on notice.

Thus, with the exception of the clauses purporting to effect a "sale" by the company and a "purchase" by Cameron and payment by means of "discounts" and "rebates" instead of commission, it seems to me that the general character of the agreement is much more consistent with agency than with absolute purchase and ownership by Cameron, for such would imply a freedom of sale and a definiteness as regards price and other matters which are conspicuously absent.

The use of the term "agent" throughout the agreement is sought to be explained away by reference to the incorporated definition of this term contained in the catalogue, where it is referred to as being "used in a complimentary sense only," and it is added that "those firms whom we style our agents are not authorized to advertise, incur any debts, or transact any business whatsoever on our account other than the sale of goods which they may purchase from us; nor are they authorized to give any warranty or make any representation on our behalf other than those contained in the above guarantee." I do not think that this definition of the term "agent," with its accompanying limitations on his powers and authority, affords any real help to the defendants. The term "agent" has in its ordinary acceptation a definite legal meaning quite distinct from and, in fact, inconsistent with the term "purchaser." No explanation is offered as to why Cameron is called "agent" instead of being referred to as "the purchaser" or as "dealer," "distributor," or "concessionaire," with all of which terms we are not unfamiliar in agreements of this character; and when I asked the learned Attorney-General what was meant by saying that the term "agent" was "used in a complimentary sense only," he was quite unable to give me any satisfactory reply. It seems to me that the term is used by the defendants in a vain endeavour to secure all advantages which can be gained from its use without the incurring of any of the corresponding obligations or liabilities. If this be the meaning of the term in its complimentary sense, the Courts should in my opinion be very slow to give it legal effect.

The question whether a transaction amounts to a sale or evidences the existence of an agency is one which has frequently perplexed the courts, and there is ample authority to support the view of the law expressed in *Benjamin on Sales* (1) that where the real effect of a transaction is to transfer property for a certain price the transaction will be deemed to be a sale although it may be called a guarantee or agency; and, conversely, a document agreeing to transfer property on payment of a certain sum will not be treated as an agreement for sale if it can be

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shown that so to treat it would be contrary to the real intention of the parties. In *Hutton v. Lippert* (1) a contract which in terms purported to be one of guarantee or agency was held to be one of sale, Sir Robt. Collier, who delivered the judgment of the Privy Council, observing at p. 311—"We have, therefore, to look to what was the real transaction between the parties, and not to what they have called it." In *Senecal v. Pauze* (2) a document purported to be a unilateral contract binding the signatories for an indefinite time to sell certain specified debentures of a company to one of its officers at a specified price, but the circumstances in which it was executed showed that the real intention of the signatories was to limit for their common benefit their claims against the company in order to facilitate some financial operation then contemplated. The Privy Council held that such intention controlled its effect and that it could not be treated as an agreement for sale for the benefit of such purchaser. The observations of Lord Macnaghten at p. 643 may be applied to the present case with peculiar appropriateness. "It was not competent," he said, "for Green (the officer of the company) to make use of the document contrary to the real intention of the parties, and to treat it as an agreement for sale of which he might avail himself for his own benefit whenever he chose." In my opinion, the defendants in the present case want under the agreement to control all sales by Cameron in a way that shows conclusively that the real intention of the parties was the establishment of an agency. If so, the company cannot be allowed whenever they choose to treat it as an agreement for sale for their own benefit.

In *Weiner v. Harris* (3) a question arose as to whether a retail jeweller received goods as a purchaser on the well-known and expressed terms of "sale or return" or merely as agent for sale. The Court of Appeal accepted the latter view, and in giving his judgment Cozens Hardy, M.R., said, at p. 290—"It is quite plain that by the mere use of a well-known legal phrase you cannot constitute a transaction that which you attempt to describe by that phrase The mere fact that goods are said to be taken on sale or return is not in any way conclusive of the real

(1) 8 A.C. 309

(2) 14 A.C. 637

(3) [1910] 1 K.B. 285

nature of the contract. You must look at the thing as a whole and see whether that is the real meaning and effect of it." At page 292, Fletcher Moulton, L.J., expresses the same view in the words—"The only difficulty in construing that letter arises from the use of the words 'sale or return.' I fully agree with what the Master of the Rolls has said that no phrase can enable a person to misdescribe a contract, that you must look at what the contract is and not at what the parties say it is."

That seems to me to be a somewhat stronger case than the present, for there the transaction was described in express terms as a "sale or return." When, as Lord Lindley put it in one of the cases, "we go through the document to get at the truth," we cannot allow the words "sale," "purchase," and "discount" to control and override the real intention of the parties and the true legal effect of the agreement, which is, in my opinion, the establishment of the relation of principal and agent and not that of vendor and purchaser.

There are other circumstances outside the agreement which compel the same conclusion. In the foreword to the defendant company's "Hints and Tips," a copy of which was handed to the plaintiff the day before he bought the bicycle, one reads that "a regular chain of service agents linking up every part of the country has been created, and in addition Triumph agents—who number well over a thousand—located throughout the British Isles are ready to render help wherever the rider is touring or domiciled." There is here no attempt to assign any meaning other than that which it naturally bears to the term "agents."

When there is added to these circumstances (a) the statement made by Cameron in his evidence that he had been agent for defendants for nineteen years; (b) the fact that Cameron on his cards described himself as motor agent, and (c) the failure by the defendants for a period of upwards of six months to contradict the plaintiff's assertion in his letter of 26th June, 1925, that Cameron was their agent, it becomes quite impossible to say that the jury had not ample evidence to justify their finding that Cameron in the sale of the motor cycle was the agent of the defendants.

In one sense, this inquiry as to whether Cameron was agent or purchaser is perhaps unnecessary, as the verdict

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can, I think, be supported on a shorter and simpler ground. It is admitted that Cameron was the duly authorised agent of the defendants to give to the plaintiff the limited form of guarantee contained in the catalogue. (See the conditions of guarantee and paragraph 5 of the defence.) The Attorney-General expressly admitted in argument that "Cameron was agent to pass on the limited guarantee on defendants' behalf." I do not pause to inquire how there could exist at the same time between the defendants and Cameron the concurrent relationships of vendor and purchaser in the alleged sale of the bicycle and of principal and agent as regards limited guarantee. Suffice it to say that the defendants held out Cameron as a person who was their agent in the matter of warranty or guarantee; and if Cameron, acting in that capacity, failed, as the jury in effect held, to bring to the notice of the plaintiff the limited character of his authority, the plaintiff is entitled to assume that his actual authority is co-extensive with his ostensible authority. The principle was briefly expressed by Lord Blackburn in *National Bolivian Navigation Company v. Wilson* (1), when he said that—"Where an agent is clothed with ostensible authority no private instructions prevent his acts within the scope of that authority from binding his principal." For these reasons I am of opinion on the facts found by the jury that the conditions implied by section 14 (1) and (2) of the Sale of Goods Act, 1893, attached to the sale of this motor bicycle to the plaintiff and are binding on the defendants.

A further argument was addressed to us on behalf of the plaintiff to the effect that the limited form of guarantee only excludes implied warranties, that section 14 of the Sale of Goods Act, 1893, relates to an implied condition as distinguished from an implied warranty, and that, accordingly, such implied condition is not excluded.

The question is rather a difficult one, for *Baldry v. Marshall* (2) does not appear to me to be a conclusive authority. In the circumstances it is unnecessary for me to express any definite opinion on the point, and I accordingly refrain from doing so, only mentioning it in order that it may be kept open for the plaintiff should the case be taken to the House of Lords.

BEST, L.J. : The action in this case was one for damages for breach of warranty in the sale of a motor bicycle. The bicycle in question was purchased by the plaintiff through one William Cameron of Ballymena, and it was alleged by plaintiff that Cameron was, at the time of purchase, the agent of the defendants, who say that he was not their agent, but that if he were so, it was only to the extent hereinafter mentioned.

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The case made by the defendants at the trial and on the hearing of the appeal was that they had sold the motor bicycle to Cameron and that plaintiff had purchased the bicycle from him as vendor and not from them, that Cameron was their agent not for sale, but only for the purpose of giving a limited guarantee in a special form, and they relied upon this guarantee as excluding the applicability to the sale of the bicycle of the provisions of section 14 of the Sale of Goods Act, 1893.

The limited guarantee which defendants gave with their motor cycles was given "instead of the guarantee implied by statute or otherwise, as to the quality or fitness of such machines for the purpose of motor cycling; any such implied guarantee being in all cases excluded." They also guaranteed "subject to the conditions mentioned below, that all precautions which are usual and reasonable have been taken by us to secure excellence of material and workmanship, but this guarantee is to extend and be in force for three months only from the date of purchase, and damages for which we make ourselves responsible under this guarantee are limited to the free supply of a new part in exchange for the part of the motor cycle . . . which may have proved defective. We do not undertake to replace or refix or bear the cost of replacing or refixing such new part in the motor cycle."

A further provision of the guarantee was to the effect that defective parts would be repaired upon the following condition, i.e., there was a guarantee as to excellence of materials and workmanship, such guarantee to extend and be in force for three months only from the time of the execution of the work "and this guarantee is in lieu and in exclusion of any common law or statute warranty, and the damages recoverable are limited to the cost of any further work which may be necessary to amend and make good the work found to be defective."

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The conditions of guarantee provided *inter alia* for the despatching of the defective parts to defendants and the giving of certain particulars, and further it was stated that "We guarantee only those machines which are bought either direct from us or from one of our duly authorised agents and under no other conditions," and there was a further proviso that "the term agent is used in a complimentary sense only and those firms whom we style our agents are not authorised to advertise, incur any debts or transact any business whatsoever on our account, other than the sale of goods which they may purchase from us; nor are they authorised to give any warranty or make any representation on our behalf other than those contained in the above guarantee."

The plaintiff, a constable in the Royal Ulster Constabulary, called upon Cameron on 13th February, 1925, and looked at two motor cycles—a Triumph and an A.J.S.—but did not decide on the purchase of either. Cameron on this occasion gave plaintiff a booklet called "Hints" and a postcard. These "Hints" contained useful directions for the starting and running of the motor cycle, and for the adjustment of certain specified parts of the machine and other particulars necessary for its smooth running, but were silent as to guarantee. There is, however, as part of the foreword to these "Hints," a paragraph headed "Triumph Service." (See ante p. 85.) The plaintiff at the trial denied that he was given a Triumph catalogue, though Cameron, who was a witness for him, says that with "Hints" and the postcard he handed plaintiff such a catalogue. That catalogue contained the guarantee already set out, but question No. 6 put to the jury "Were the terms of the written guarantee (or warranty) made part of the contract of sale of the motor cycle" was answered by them in the negative, so that it must be taken that, as there was evidence to support this finding of the jury, the terms of the written guarantee were not communicated by means of the catalogue, or at all, to the plaintiff prior to the sale of the motor cycle to him. I cannot agree with the contention of the learned Attorney-General that the answer to this question is against evidence and the weight of evidence.

On 14th February, 1925, the plaintiff wrote to Cameron on the postcard supplied to him by Cameron saying: "With reference to the $3\frac{1}{2}$ h.p. Triumph motor cycle I saw on 13/2/25 I will take same as soon as you get it." In explanation of the terms of this postcard it may be said that the motor cycle seen by plaintiff was one not for sale but kept on the agent's premises for the purpose of demonstration and exhibition of the company's (i.e., defendants') products, pursuant to an agreement, hereinafter mentioned, of 4th December, 1924, made between defendants and Cameron. He further said I got invoice on 27th March. I went to Ballymena on 28th and saw Cameron. He said "This is your machine." I paid £45 13s 0d for it and got receipt. A brown envelope was attached to front forks. Mr. Cameron pulled it off and handed it to me saying "This is your guarantee and running instructions." I put it in my pocket. I read it next day in barracks.

Wm. Cameron was examined for plaintiff and said he was a cycle agent in Ballymena and had been agent for the defendants for nineteen years, and he gave an account of the plaintiff's visit to his premises on 13th February, 1925, and said I gave him (plaintiff) "Hints," a Triumph catalogue, an A.J.S. catalogue, and a postcard. I sent an order to the defendants and sent the plaintiff the invoice to Cushendall. I sell quite a number of cycles to the Royal Ulster Constabulary. I knew what he wanted it for. He said he was a novice. On 28th March he paid me and got a receipt. A brown envelope is attached to every machine. I detached it and handed it to the plaintiff. I did not read it to him, nor see him read it. A letter from this witness to the defendants, reporting the accident and the nature of the damage to the motor cycle, was put in evidence, and he gave a description of the condition of the motor cycle after the accident and details of the faulty attachment of the Bowden wire to the front brake, which was alleged to have caused the accident. The defendants replaced on the machine the parts which were defective or missing and Cameron sold the machine for the plaintiff.

On cross-examination, Cameron produced the agreement of 4th December, 1924, entered into by him with the defendants. He also produced an invoice from the defendant's dated 16th February, 1925, for the machine which subsequently was sold to the plaintiff, and said that this

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and other machines had been ordered by him from the defendants in November, 1924, and had been paid for by cheque on 9th February, 1925. He also produced a notice from the defendants, dated 7th February, 1925, informing him that the motor cycle which subsequently was sold to the plaintiff with others would be available for despatch within the next few days, but in point of fact these machines did not reach Cameron until near the end of March, 1925. On the 26th of that month a notification was sent by him to the plaintiff that the machine was now ready for delivery, and it was delivered to the plaintiff and paid for on 28th March.

The brown envelope which was handed to the plaintiff by Cameron after the latter had delivered the machine to the plaintiff and had been paid for it and had given a receipt for the price, contained a document headed—Important. Every motor cycle and/or sidecar is sold by the Triumph Cycle Co., Ltd., subject to the following limited warranty : Guarantee, and then is given the guarantee, the material parts of which have been already set out. At the end there is the following endorsement—I/We on my/our part as seller(s) give notice that this motor cycle and/or sidecar is exhibited and sold by me/us subject to the same limited warranty as that above contained.

(Signed)

The endorsement or notice at the end of the guarantee so handed to the plaintiff was not at any time signed by Cameron.

The case made for the defendants at the trial of the action and on the hearing of the appeal was that the defendants did not sell the motor cycle to the plaintiff, that in any event the liability of the defendants was limited by their guarantee as to the replacement of defective parts and that the defendants had fulfilled this guarantee.

In support of the submission that the defendants did not sell the motor cycle to the plaintiff reliance was placed upon the terms of the agreement already referred to dated the 4th December, 1924, entered into between the defendants and Cameron. This agreement contained provisions that the company will sell to the agent (i.e. Cameron) during the term of the agreement motor

cycles and combinations for sale in the territory allotted to him; it defined the allotted territory consisting of certain named towns all situate in Co. Antrim. Further, the agent agreed to purchase and to pay for, in accordance with certain terms set out, not less than a certain number of motor cycles and combinations between 1st September, 1924, and 31st August, 1925, monthly deliveries of the machines were to be given by the company and taken by the agent as per schedule annexed to the agreement, and the prices to be paid by the agent and the terms of sale were to be those fixed by the company during such period, and no damages were to be claimed for delay or failure in delivery, and the agent was to pay the company in the case of wilful breach of this clause the sum of £2 in respect of each motor cycle or combination not accepted.

Other clauses of the agreement imposed stringent restrictions on the agent as to the prices at which the machines might be sold by him both for cash and on the hire purchase system, as to the supply of machines to other agents, called sub-agents, within the agent's district, as to the sale of machines to any dealer outside the agent's district or for export, and as to sale of such machines by auction, and the agent undertook not to exhibit any motor cycle supplied by the Company at any exhibition held in Great Britain and Ireland without the Company's previous written consent.

Counsel on both sides agreed that the main, indeed the sole question, for our decision is whether Cameron in selling the bicycle to the plaintiff sold it as agent for the defendant company, or, can the answer of the jury to question No. 2 put to them by the learned judge at the trial be supported by evidence? That question is in the following terms:—Was W. Cameron in the sale of the motor cycle the agent of the defendants? And the jury's answer was, Yes.

Mr. Beattie put the matter in another way by saying that the whole foundation of the plaintiff's case is based upon a sale between him and the Triumph Cycle Company. This sale could only take place if Cameron was the company's agent. The defendants rely on the terms of the agreement of 4th December, 1924; they also rely on the ordering from them of the motor cycle in question with others by

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Cameron and of his payment for them before the plaintiff came on the scene, and indeed they rely on their whole course of business with Cameron as showing that he purchased the bicycles from them and was not agent for their sale.

I think Mr. MacDermott's argument is sound that one is not bound to hold that the transactions between defendants and Cameron are sales merely because the words "sale" or "sell" occur in the agreement or because these transactions purport to be sales. One should look at the contents of the agreement as a whole, its fetters on re-sale and on the credit which Cameron may give to purchasers, its provisions about dealing with sub-agents, the very term being meaningless if there are no agents, and the provision that if there should be a breach of the agreement by the defendants, Cameron can claim no damages. But, whatever be the effect of this agreement of 4th December, 1924, it was not brought to the notice of the plaintiff until long after the cause of action, if any, had arisen. I have come to the conclusion from reading the evidence as a whole that there was abundant justification for the answer given by the jury to question No. 2. If this be so, the warranty implied by Section 14 of the Sale of Goods Act, 1893, came into operation, and the special warranty relied on by defendants never applied.

I am of opinion that there was ample evidence to support the findings of the jury, that there was no misdirection by the learned judge, and I agree that the appeal should be dismissed with costs.

Solicitor for the plaintiff : *Thomas Elliott.*

Solicitors for the defendants : *Carson & M'Dowell.*

J. M'C.

[IN THE COURT OF APPEAL.]

MACLEAN AND GRAHAM v. SMITH AND
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(No. 194. 1926.)

Settlement—Construction—Real Estate—“ Statute for the distribution of the estates of intestate persons ”—22 Car. 2. c. 10.

A.S. conveyed and assigned her real estate to trustees, their heirs and assigns for ever and also a mortgage debt and securities to the trustees, their heirs, executors, administrators and assigns upon various trusts. The ultimate trust (which in the events which happened came into force) was: “ Upon trust to transfer or pay the same to the next-of-kin of the said A.S. in the same way as if she had died absolutely possessed of the trust premises intestate and without having been married.” Throughout the trust deed, the realty and the personalty were treated as one unit.

On a summons raising the question whether the heir at law or the statutory next-of-kin of the settlor became entitled to the real estate of the settlor—

Held, by the Court of Appeal (Andrews L.J. and Best L.J.), affirming the judgment of Wilson J., that the next-of-kin were entitled.

APPEAL from the judgment of Wilson J. as to the construction of an indenture of settlement dated the 27th day of June, 1895, and made between Agnes Smith of the one part and Hugh Rainey and John Dickson of the other part.

By that indenture Agnes Smith, the settlor, conveyed and assigned her real estate to Hugh Rainey and John Dickson, the trustees, their heirs and assigns for ever and also a mortgage debt and securities to the trustees, their heirs, executors, administrators and assigns upon usual trusts. In the events which happened the ultimate trust expressed in the indenture came into force. It was:—
“ Upon trust to transfer or pay the same to the next-of-kin of the said Agnes Smith in the same way as if she had died absolutely possessed of the trust premises intestate and without having been married.”

The questions raised by the summons were (inter alia):—

(1) In the Court of appeal before Andrews, L.J., and Best, L.J.

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1. Whether according to the true construction of the said indenture of settlement and in the events which have happened (namely the death of Agnes Smith, the settlor, under the said settlement intestate and a spinster and without having exercised the power of appointment conferred upon her by the said settlement) the defendant, David Thompson Smith, as heir-at-law of the said Agnes Smith has become beneficially entitled in possession to the freehold hereditaments, rent and premises settled by the said settlement.

2. Whether according to the true construction of the said indenture of settlement and in the events which have happened the next-of-kin of the said Agnes Smith have become beneficially entitled in possession to the said freehold hereditaments, rents and premises.

Mr. Justice Wilson answered the first question in the negative and declared that according to the true construction of the said indenture of settlement and in the events which had happened, the defendant, David Thompson Smith, as heir-at-law of the said Agnes Smith, had not become beneficially entitled in possession to the freehold hereditaments, rents and premises settled by the said settlements.

He answered the second question in the affirmative and declared that according to the true construction of the said indenture of settlement and in the events which had happened the next-of-kin of the said Agnes Smith had become beneficially entitled in possession to the said freehold hereditaments, rents and premises.

The heir-at-law appealed.

Babington K.C. Attorney-General and *McKean* for the heir-at-law :—

In a limitation in a deed where there is a gift to the next-of-kin without any reference to the Statute of Distributions, either expressly by reference to the statute or impliedly as here, then next-of-kin means the nearest in blood, Vol. 25 Halsbury 581 and *Akers v. Sears* (1). In this case who the next-of-kin are cannot be ascertained until the whole clause is read, and when it is read, it is clear that the meaning is the next-of-kin according to the statute.

Accordingly, while the clause is an apt way of disposing of personalty, it is not a proper way to dispose of realty because realty does not go to the next-of-kin but to the heir-at-law. The clause means that the whole property is to go according to law: the realty to the heir-at-law, the personalty to the next-of-kin: *In re Hughes* (1) and *In re Hudson* (2). As a result, there is no disposition of the real estate and therefore there is a resulting trust for the heir-at-law.

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Beattie K.C. and *Johnson* for the next-of-kin:—

The clause is perfectly plain if it is read as it stands without going into fine distinctions. Throughout the deed, the realty and the personalty are treated as one unit and in the ultimate limitation the settlor says the whole property is to go to the next-of-kin, whom she describes fully to avoid any ambiguity. The whole property is not to go to the nearest in blood but to all the rest of kin as found by reference to the Statute of Distributions. The gift here to the next-of-kin is in effect one to personæ designatæ.

In re Hughes (1) and *In re Hudson* (2) are no authorities for the present case: in neither were the next-of-kin mentioned.

In *Nolan v. Burke* (3), the converse of the present case, it was held that personalty went to the heir-at-law.

McKean in reply.

The trustees were not represented by counsel.

ANDREWS LJ. : We have received all possible assistance from counsel in this case and it will not, therefore, be necessary for us to consider our judgment further.

In my opinion the case turns entirely on the form of the deed of the 27th June, 1895, and is not determined by any of the cases which have been cited. By that deed the settlor, Agnes Smith, conveyed and assigned the real estate to the trustees, their heirs and assigns for ever and

(1) [1916] 1 ch. 493
(2) 72 L.T.N.S. 892

(3) 34 I.L.T.R. 78

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the mortgage debt and securities to the trustees, their heirs, executors, administrators and assigns upon trust to pay the income to the settlor for life, with power to her by deed or will to appoint that after her decease the whole or any part of the trust premises should be transferred or paid to any person or persons she might nominate. It is important to note that the expression "trust premises" here obviously includes both the real estate and the mortgage debt. Then follows trusts of the same "trust premises" in favour of her children, with the usual hotch-pot clause applicable to the entire trust premises. After a further general power of appointment, there comes the clause, the construction and legal effect of which we are called upon to consider. It reads as follows:—"And in default of such appointment and so far as any appointment shall not extend upon trust to transfer or pay the same to the next-of-kin of the said Agnes Smith in the same way as if she had died absolutely possessed of the trust premises intestate and without having been married." The immediately succeeding clauses in the deed confer powers of sale of the "trust premises" upon the trustees both during the life and after the death of the settlor.

It cannot be doubted in these circumstances that the words "the same" and "the trust premises" in the clause which we have to interpret, include both the realty and personalty; and in my opinion it is clear that it was the settlor's intention that the entire property should pass in the events which have happened to her next-of-kin. There is no more legal difficulty in conveying real estate to next-of-kin than there is in assigning personal estate to the heir. In either case the objects of the grant or assignment take, not as next-of-kin or heir, but because they fill the particular class or character referred to.

The learned Attorney-General, who appeared for the heir-at-law, did not, I think, challenge what I have stated, but he contended that, though this may have been the settlor's intention, effect could not be given to it. He argued that it was impossible to transfer real estate to the next-of-kin of the settlor "in the same way as if she had died absolutely possessed of the trust premises intestate and without ever having been married," for in such events

real estate would not pass to the next-of-kin in "any way," and accordingly could not pass in "the same way" as was specified. Further, he submitted that reference to intestacy implies a reference to the Statute of Distributions: *In re Gray's Settlement*, *Akers v. Sears* (1) and that real estate could not pass under that statute. He, therefore, asks us to hold that as the language of the clause is wholly inappropriate to realty, the real estate passes under a resulting trust to his client, the heir-at-law.

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In my opinion it is not necessary and I, accordingly, decline to give to the words "in the same way" the meaning for which the Attorney-General contends. Had the clause stopped with the words "next-of-kin of the said Agnes Smith" the trust would have been for her nearest blood relations, and in my opinion the words "in the same way as if she had died absolutely possessed of the trust premises intestate" were not intended to, and did not in fact, do more than first introduce by implication a reference to the Statute of Distributions thereby enlarging the class so as to include those who take under that statute by representation; and secondly, to confer as a consequence upon the members of such extended class the interests of tenants in common, instead of, as they otherwise would have been, the interests of joint tenants.

In my opinion the meaning which I have thus assigned to the words satisfies the language employed and creates no inconsistency in the deed whilst at the same time permitting us to construe it as a whole. Furthermore, it enables us to carry out the underlying principle of the deed by which the settlor dealt with the property as one unit. The appeal must therefore be dismissed with costs.

BEST L.J. : I concur with the judgment just delivered by Lord Justice Andrews and have little to add.

In my opinion the words in the limitation "in the same way" refer both to the persons who are to take and the shares in which they are to take.

The clauses immediately after the one we are called on to construe are most important. Powers of sale were conferred on the trustees both in the lifetime of the settlor and after her death. It may be that that is not conversion, but there can be no doubt that if the trustees had sold the

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real estate the proceeds would devolve on the next-of-kin.

Throughout the whole deed, the realty and personalty are treated as one unit, and in my opinion under this limitation the united property is to be distributed to the same persons and in the same shares as if it were all personal estate.

Solicitors for the trustees : *Messrs. Carson & M'Dowell.*

Solicitor for the heir-at-law : *H. G. Thompson.*

Solicitor for the next-of-kin : *S. Campbell.*

A. A. C.

ROBERT MORRISON AND ISODORE J. BRADLAW

K. B. D.

v.

H.M. COMMISSIONERS OF CUSTOMS AND EXCISE
AND THE MINISTRY OF FINANCE FOR NORTHERN
IRELAND (1).

1926.

Nov. 2

Theatre—Licence—Grant of—Excise Act, 1835 (5 & 6 Will. IV., c. 39), s. 7—Intoxicating Liquor Act (Northern Ireland), 1923 (13 & 14 Geo. 5, c. 12), s. 9.

Justices of the Peace have power to grant a theatre licence to perform plays, etc., under the implied authority contained in 5 & 6 Will. 4, c. 39, s. 7. A licence for the sale of intoxicating liquor, granted in pursuance of that section, is not a licence within the meaning of the Intoxicating Liquor Act (Northern Ireland), 1923.

APPLICATION to make absolute a conditional order for a writ of mandamus.

On the 4th day of January, 1926, the Recorder of Londonderry granted a theatre licence to perform plays, etc., in respect of the Londonderry Opera House. Robert Morrison and Isodore J. Bradlaw, the proprietors thereof, then appointed P. W. Whittle to apply to the Commissioners of Customs and Excise for a licence to sell beer, spirits and wine in the Londonderry Opera House as a theatre licensed by justices within the meaning of section 7 of the Excise Act, 1835 (5 & 6 Will. IV., c. 39).

The Commissioners refused to grant the licence on the grounds that the order of the Recorder of Londonderry purporting to grant a theatre licence for the performance of plays etc., in the Londonderry Opera House was made without or in excess of jurisdiction, and was of no effect. And further, that they were precluded from granting the licence by section 9 (a) of the Intoxicating Liquor Act (Northern Ireland), 1923.

The prosecutors obtained a conditional order for a writ of mandamus directed to the Commissioner of Customs and Excise and to the Ministry of Finance for Northern Ireland, enjoining them to grant to Percy Winder Whittle, manager of the Londonderry Opera House, a retail licence to sell beer, wine and spirits in the Opera House, being a theatre licensed by justices within the meaning of section 7 of the Excise Act, 1836.

(1) Before Moore, L.C.J., and Brown, J.

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Davison (with him *Murphy K.C.*) for the prosecutors, moved to make the conditional order absolute. Under 5 & 6 Will. 4, c. 39, it is lawful for the Commissioners of Excise to grant retail licences to any person to sell beer, spirits and wine in any theatre established under a royal patent or in any theatre or other place of public entertainment licensed by the Lord Chamberlain or by justices of the peace without the production by the person applying for such licence of any certificate or authority for such persons to keep a common inn, alehouse or victualling house; anything in any Act to the contrary notwithstanding. There is an implied authority under this section for the justices to grant a theatre licence, and this is the construction which has been acted upon since the passing of the Act. At the time of the passing of the Act the only power to license theatres in Ireland was in Dublin, where a patent might be granted under 26 Geo. III., c. 57 (Ir.), and if the construction put upon the Excise Act, 1835, by the Revenue Authorities is correct (namely, that there is no implied power under the Act for justices to issue licences for theatres) then no licence under the Act could legally have been issued in Ireland except to theatres in Dublin holding under Royal Patent.

The Commissioners raise the point that they are precluded by the Intoxicating Liquor Act (Northern Ireland), 1923, from granting any further licence. We submit that this licence is not a licence within the meaning of that Act. The term licence is not therein expressly defined, but section 13 enacts that other expressions have the same meaning as in the Licensing (Ireland) Acts, 1833 to 1900, which do not include the Excise Act, 1835. The Licensing (Ir.) Act, 1874, s. 37, defines "licence" as "any licence for sale of any intoxicating liquor granted by an officer of excise in Ireland upon production in the police district of Dublin metropolis of a certificate of the Recorder of the City of Dublin, or of a divisional justice, and elsewhere of a certificate of any Recorder of a city or borough or of justices under the provisions of any Act now or hereafter requiring such certificate, but shall not include an excise licence as defined by section eighty-one of the principal Act, or a wholesale beer dealer's licence, as hereinafter defined." The Excise Act of 1835 expressly states that a certificate such as is referred to in the definition of

“licence” in the Licensing (Ir.) Act, 1874, is not required for the grant of a licence under that Act, and accordingly such a licence is not one within the scope of the Intoxicating Liquor Act (Northern Ireland), 1923.

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Dougherty (with him *A. B. Babington K.C. Attorney General*) for the Commissioners of Customs and Excise shewed cause.

There is no authority given to the Recorder of Londonderry to issue this licence under the Excise Act, 1835. The argument that the words “licensed by justices” gives the justices power to license is fallacious. If this were so there would have been no necessity for the power to license theatres given by the Act of 6 & 7 Vict., c. 68, s. 5, to justices of the peace in England.

At the time of the passing of the Excise Act, 1835, there was no power in Ireland to license theatres except in Dublin under 26 Geo. III. (Ir.), c. 57, though there was power to license theatres in the City of London and Westminster under 25 Geo. II., c. 36, and justices were enabled to license theatrical entertainments in England under 28 Geo. III., c. 30.

The Court, referring to the case of *R. v. County Council of West Riding of Yorkshire* (1), were of opinion that although the Act of 1835 was silent as to many of the usual conditions for obtaining a theatre licence such as giving of notice of the application and the particular tribunal to which application should be made, and the period of duration of the licence, etc., nevertheless the Act of 1835 conferred a jurisdiction in the matter upon justices in Ireland which still exists, and which they were still competent to exercise. The Court also held that the licence in question, not requiring an annual certificate, was not within the definition of “licence” in the Licensing Act of 1874, and therefore was not within the Northern Ireland Intoxicating Liquor Act, 1923. They directed the conditional order to be made absolute.

Solicitors for the Prosecutors : *Frederick G. Dickenson*

Solicitor for the Commissioners of Customs and Excise :
John R. Moorehead.

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Feb. 7

THE KING (MURRAY) v. THE RECORDER OF
LONDONDERRY (1).
(1926. No. 711).

Tolls—Market—Sale of vegetables within the City of Londonderry—Londonderry Corporation Act, 1918 (8 & 9 Geo. 5 cxxi) s. 239—Market and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14) s. 13—Londonderry Improvement Act, 1848 (11 & 12 Vict. c. xli)—Londonderry Improvement Act, 1896 (59 & 60 Vict. c. ccxlix)—Certiorari.

By a local Londonderry Improvement Act, 1848, incorporating the Market and Fairs Clauses Act, 1847, the Corporation was authorized to levy tolls on, among other things, vegetables exposed for sale in their markets. In the year 1896 a further local Act was passed authorizing further tolls supplementary to those contained in the Act of 1848, and in 1918 the Londonderry Act of that year was passed which enabled the Corporation (s. 239) to demand and receive for the use of their markets such charges, etc., as might be prescribed by the Local Government Board, and any charges so prescribed were substituted for the charges specified in schedule D of the Act of 1848 and schedule B of the Act of 1896.

David Murray was convicted at the Petty Sessions of Londonderry, on a complaint that he did at Bishop Street and Lecky Road on 9th March, 1926, sell and expose for sale articles to wit vegetables in respect of which tolls are by the Londonderry Improvement Act of 1848 authorized to be taken in the complainant's market, otherwise than in his own dwelling place or shop, he not being a licensed hawkers.

The respondent appealed to the Recorder of Londonderry who made an order to amend the summons and conviction (if necessary) by substituting the Public Health (Ireland) Act, 1878, for the Londonderry Improvement Act, 1848, and being of opinion that section 13 of the Market and Fairs Clauses Act, 1847, still applied to the Londonderry markets affirmed the conviction.

The respondent obtained a conditional order for certiorari to bring up and quash the conviction.

Held (by the Divisional Court), that no amendment of the conviction was necessary and that the conditional order not having been granted on the ground of uncertainty this point was not open to the respondent;

And *held* that the conviction was right; the Londonderry Improvement Act of 1848 being still in force, and publication of the lists of tollable articles and confirmation by the Local Government Board having been proved, it was immaterial whether the tolls were described as made under the Act of 1918 or under the Act of 1848. All that the Act of 1918 did was to substitute a new list of tolls for tollable articles for that theretofore in force.

(1) In the Divisional Court before Moore, L.C.J., and Brown, J.

CERTIORARI. Motion to make absolute a conditional order for writ of certiorari directed to the Recorder of Londonderry to remove into the King's Bench Division, for the purpose of being quashed, the orders and adjudications of the said Recorder made at the General Court of Quarter Sessions on the 12th day of June, 1926, on the hearing of an appeal by David Murray from an order of the Justices of the City of Londonderry made at the Police Court, in the County of the City of Londonderry, on the 22nd day of April, 1926, on the hearing by them of a complaint designated the Mayor, Aldermen and Burgesses of the County Borough of Londonderry, Complainants; David Murray, Defendant; that the defendant did at Bishop Street and Lecky Road in the said city on the 9th day of March, 1926, expose for sale articles, to wit, vegetables, in respect of which tolls are by the Londonderry Improvement Act, 1848, authorised to be taken in the complainants' market, such selling being otherwise than in defendant's own dwelling place or shop, and defendant not being a licensed hawker, whereby the defendant rendered himself liable to a penalty not exceeding forty shillings, whereon the said justices convicted and fined the defendant one pound and costs.

The respondent appealed to the Recorder of Londonderry.

It was admitted at the hearing that the appellant had sold vegetables within the limits of the city, in the streets of the city otherwise than in the market and not in his shop or dwelling-house, and that the defendant was not a licensed hawker. It was also conceded that vegetables are mentioned in Schedule D to the Londonderry Improvement Act, 1848, as subject to market tolls, and also in the schedule of tolls prepared by the Corporation under the provisions of the Londonderry Corporation Act, 1918, and that such schedule has received the sanction of the Local Government Board. It was also admitted that a list of the tolls set out in the last mentioned schedule has since March, 1921, been exhibited in the Londonderry Market. It was also admitted that before March, 1921, a list of tolls leviable under the Londonderry Improvement Acts of 1848 and 1896 was similarly exhibited in the

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Londonderry market, but that since March, 1921, only a list of tolls under the Corporation Act of 1918 was exhibited, such lists taking the place of the lists of tolls formerly exhibited.

Mr. M'Coy for the appellant contended that the facts disclosed no offence, on the ground that section 13 of the Markets and Fairs Clauses Act, 1847, under which the prosecution was brought no longer applied to the market in the city or to sales in the city. He conceded that the Markets and Fairs Clauses Act, 1847, was incorporated in the Londonderry Improvement Act, 1848, and was "a special Act" for the purpose of section 13 of the Market and Fairs Clauses Act, 1847; but he contended that tolls are no longer leviable under the Londonderry Improvement Act, 1848, but only under the Londonderry Corporation Act, 1918, and that as this latter Act does not incorporate the Market and Fairs Clauses Act, 1847, there is now no "special Act" as mentioned in section 13 of the Market and Fair Clauses Act, 1847, under which the Corporation are entitled to demand tolls, and that accordingly since 1918 the Londonderry market has not the protection of section 13 of the Market and Fairs Clauses Act, 1847.

He also referred to section 41 of the Markets and Fairs Clauses Act, 1847, which provides that owners of a market to which the Act applies shall exhibit in the market a list of tollable articles and the respective toll on each article, and that such tolls are to be payable to the owners of the market only during the period in which such list is so exhibited. He said that since March, 1921, the list of tolls under the Improvement Acts of 1848 and 1896 had ceased to be exhibited, and that accordingly from that date tolls ceased to be payable under those Acts, and that as the Londonderry Corporation Act, 1918, does not incorporate the Markets and Fairs Clauses Act, 1847, since March, 1921, there is no "special Act" under which the tolls are leviable in the city, and in the absence of such "special Act" section 13 of the Markets and Fairs Clauses Act, 1847, under which the prosecution is brought, has no application.

Mr. Murphy, K.C., for the respondents, conceded that as far as sales in the market are concerned the tolls on

such sales are regulated by section 239 of the Londonderry Corporation Act, 1918, but he contended that as far as sales otherwise than in the market are concerned the tolls payable in respect of such sales were still regulated by the Londonderry Improvement Acts, 1848 and 1896, and that accordingly the Corporation are still entitled to demand tolls under these Acts. In reply to the contention that the non-exhibiting since March, 1921, of a list of tolls under the Londonderry Improvement Acts, 1848 and 1896, as required by section 41 of the Markets and Fairs Clauses Act, 1847, terminated the right of the Corporation to levy tolls under these Acts, he argued that while such tolls might not be payable until and unless such list was exhibited, still such tolls though not payable remained "tolls that are by the special Act authorized to be taken in the market" within the meaning of these words in section 13 of the Markets and Fairs Clauses Act, 1847, and that although a civil bill for such tolls might not succeed, a prosecution under this section 13 can be sustained. He also referred to and relied on section 103 of the Public Health (Ireland) Act, 1878, and argued that the Londonderry market tolls are now regulated by that section, and as it incorporated the Market and Fairs Clauses Act, 1847, tolls leviable under this section 103 of the Public Health (Ireland) Act, 1878, have the protection of section 13 of the Act of 1848, and the conviction can accordingly be sustained.

The Recorder was of opinion that after the passing of the Londonderry Act of 1918 tolls in Londonderry were to be regulated not merely by that Act but also by section 103 of the Act of 1878 and entitled to the protection that section 103 gave to such tolls by incorporating section 13 of the Markets and Fairs Clauses Act, 1847. He held accordingly that the conviction could be sustained. He allowed an amendment of the summons and of the conviction by substituting for the reference to the Londonderry Improvement Act, 1848, a reference to the Public Health (Ireland) Act, 1878.

The certified copy of the ruling of the Recorder was:—
 "Amend summons and conviction (if necessary) by substituting the Public Health (Ireland) Act, 1878, for the Londonderry Improvement Act, 1848, and the Court being

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of opinion that section 13 of the Markets and Fairs Clauses Act, 1847, still applies to the Londonderry markets, affirm the conviction without costs of appeal.”

The conditional order was obtained on the grounds that :—(1) Neither at Petty Sessions nor at the General Court of Quarter Sessions was there any application to amend the complaint or order of conviction by substituting for the reference to the Londonderry Improvement Act, 1848, a reference to the Public Health (Ireland) Act, 1878, nor was David Murray or his solicitors informed of the amended charge to be made against him.

(2) No objection was taken by the Complainants or their solicitors or counsel at the hearing of said complaint or appeal on account of any omission or mistake in the said complaint.

(3) He was prejudiced and the merits of his defence affected by the amending of the complaint by His Honour the Recorder of Londonderry after the hearing of the appeal had been concluded, when he had no opportunity of having the matter argued.

(4) No evidence was adduced to bring the case within the provisions of section 103 of the Public Health (Ireland) Act, 1878, nor was there any application made to amend the complaint.

(5) The essentials of justice have been disregarded inasmuch as he was not informed of the change in the charge he had to meet or when he had to meet it.

(6) He was not charged with the offence in respect of which the conviction now in question was made, and there was no jurisdiction in the General Court of Quarter Session to amend the complaint.

(7) (a) Tolls are no longer payable under the Londonderry Improvement Act, 1848.

(b) Section 13 of the Markets and Fairs Clauses Act, 1847, does not apply to the said complaint inasmuch as it is not incorporated in the Londonderry Corporation Act, 1918, being the special Act under which tolls are payable.

(c) Section 103 of the Public Health (Ireland) Act, 1878, does not apply to the complaint. The Local Government Board for Ireland prescribed the revised schedule of market tolls, weighing and stallage (being in substitution for the market tolls, weighing and stallage and other charges specified in schedule D to the Londonderry

Improvement Act, 1848, and in schedule B to the Londonderry Improvement Act, 1896) not for the purposes of section 103 of the Public Health (Ireland) Act, 1878, but for the purposes of section 239 of the Londonderry Corporation Act, 1918.

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(d) The complaint is not an offence under any statute or special Act applying to the City of Londonderry markets.

(e) The said conviction and order are bad in law.

(f) The said order was made without and in excess of jurisdiction.

Beattie K.C. and *M'Coy* for Murray moved to make absolute the conditional order and advanced the same arguments as were presented to the Recorder, and in addition argued that the order made by the Recorder was bad on its face inasmuch as it did not show definitely under which statute the conviction was made.

[The Court held that this argument was not open to the prosecutor, this not being one of the grounds upon which the conditional order was sought.]

Murphy K.C., *Lowry K.C.* and *Dougherty*, for the respondents, submitted in reply arguments on similar lines to those submitted before the Recorder.

Cur. adv. vult.

MOORE, L.C.J. David Murray was on the 22nd April, 1926, convicted at the Petty Sessions of Londonderry on a complaint that he did at Bishop Street and Lecky Road in the City of Londonderry on the 9th day of March, 1926, sell and expose for sale articles, to wit, vegetables, in respect of which tolls are by the Londonderry Improvement Act, 1848, authorized to be taken in the complainant's market, such selling being otherwise than in his own dwelling-place or shop and he not being a licensed hawker, whereby he has rendered himself liable to a penalty not exceeding forty shillings. On the complaint he was convicted and ordered to pay a penalty of one pound and one pound for costs.

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From this he appealed to the Quarter Sessions, and the Recorder of Londonderry affirmed the conviction, though

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varying the penalty, and made an order of which the following (dated the 12th June, 1926) is the entry in the Crown book : "Amend summons and conviction (if necessary) by substituting the Public Health (Ireland) Act, 1878, for the Londonderry Improvement Act, 1848, and the Court being of opinion that section 13 of the Markets and Fairs Clauses Act, 1847, still applies to the Londonderry markets, affirm the conviction without costs of appeal."

David Murray obtained a conditional order from this Court on 19th November, 1926, to bring up for the purpose of being quashed all and singular the orders and adjudications of the said Recorder of the 12th day of June, 1926, on many grounds to which in my opinion it is not now necessary to refer.

The offence with which the prosecutor was charged was an offence created by section 13 of the Markets and Fairs Clauses Act, 1847, whereby it was provided that after a market is opened for public use every person who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by the special Act authorized to be taken in the market, shall for every such offence be liable to a penalty not exceeding forty shillings.

In the eleventh and twelfth years of Queen Victoria the Mayor and Corporation of Londonderry obtained a local Act of Parliament, cap. cxli., to which I shall hereafter refer as the Act of 1848.

By section 34 for the purposes of the Markets and Fairs, thereafter mentioned the provisions of the Markets and Fairs Clauses Act, 1847, were incorporated with the Act; the Council were empowered under sections 35 to 37 to provide markets and slaughter-house, and by sections 38 to 45 to charge tolls as set out in schedule D to the Act. One of the tollable articles appearing in schedule D is vegetables, and it was in respect of a sale of vegetables that David Murray was convicted.

There is no doubt that the Act of 1848 was the special Act within the meaning of the Markets and Fairs Act of 1847. In the fifty-ninth and sixtieth year of Queen Victoria the Corporation obtained a further local Act, cap.

ccxlix (hereinafter called the Act of 1896). The preamble recites the Act of 1848 so far as the Corporation are empowered to demand and levy tolls on any marketable commodity within schedule D and that it was expedient to authorize such further or other tolls and under such conditions as therein provided.

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By part iv of the Act of 1896, section 26 (the only section dealing with the subject), the Corporation were authorized to charge certain tolls on commodities brought into the market and set out in schedule B, and such tolls were to be supplementary or in addition to the tolls authorized by the Act of 1848, as set out in schedule D. Schedule B did not alter or affect many of the articles in schedule D of the prior Act, and tolls under that Act still continued to be levied so far as not altered by the Act of 1896. In these circumstances the Londonderry Corporation Act, 1918 (8 & 9 Geo. 5, cap xxi) came to be passed. Part xii deals with tolls and markets, and section 239 is the most important. It recognises the Act of 1848 and 1896 as still in force, and says that notwithstanding anything in either of them the Corporation may demand and receive for the use of their markets such charges, etc., as may be prescribed by the Local Government Board, and any . . . charges so prescribed shall be substituted for the . . . charges specified in schedule D of the Act of 1848 and schedule B of the Act of 1896. Sub-section (2) provides that until such new . . . charges are prescribed the Corporation shall continue to receive the old charges.

The list of tolls was subsequently in due form confirmed by the Local Government Board on the 18th March, 1921, and it includes vegetables, as did the schedule to the Act of 1848, and it is further admitted that in compliance with section 41 of the Markets and Fairs Clauses Act, 1847, such tolls were duly published and exhibited, purporting to be made under the Act of 1918.

In these circumstances, was the prosecutor properly charged and convicted under the Act of 1848? In my opinion, he was. It has never been repealed; except in so far as it has been altered by subsequent legislation it is still in force. It is the only Act that authorizes a market at all. The other two Acts only deal with tolls and charges in the market. All

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that the Act of 1918 did in respect of the Act of 1848 was to substitute for schedule D a new list of tolls for tollable articles, not to be put in force until prescribed by the Local Government Board. In my judgment, the Act of 1848, as altered by the Acts of 1896 and 1918, is still the special Act. If the tolls charged since the new scale came into force were, in fact, exhibited since 1921, I think it is immaterial whether or not they were described as made under the Act of 1918 or of 1848, or of both, or of either. I do not find it necessary, therefore, to come to a decision as to whether or not section 103 of the Public Health (Ireland) Act, 1878, applies to the present case. I think the conviction of the Justices was correct in law; that no amendment to it was necessary, and that the Recorder was correct in affirming it. The conditional order was not obtained on the ground of uncertainty in the decision of the learned Recorder, or that it was bad on its face, and I do not therefore think that any argument on the words "to be amended if necessary" should be addressed to the Court.

The motion to make absolute the conditional order, will therefore be refused with costs.

BROWN, J. I concur with the judgment just delivered by the Lord Chief Justice. I only wish to add, as Mr. Beattie has laid so much stress in his able argument on the question of the strict interpretation of these statutes, that where powers are given to representative public bodies to be used in the public interest, the rules of interpretation are not so strict.

Solicitors for David Murray : *Messrs. Todd & Mark.*

Solicitor for Londonderry Corporation : *Sir Henry Millar.*

A. A. C.

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April 28
May 2

ADAMS v. M'GOLDRICK (1).

Landlord and Tenant—Lease for lives and years—Term of years, whether concurrent or reversionary.

A sub-lease made on the 27th April, 1869, demised certain lands from its date for the life of the surviving cestui qui vie named in the head lease of the 1st April, 1812, "and for and during the term of 61 years."

Held, by Wilson J. on a summons brought under the Vendor and Purchaser Act, 1874, that the term of 61 years was reversionary and not concurrent, and that it began to run on the 27th day of February, 1895, when the cestui qui vie died.

SUMMONS brought under the Vendor and Purchaser Act, 1874, by David Adams the purchaser in respect of a contract dated the 11th day of February, 1927, for the sale of certain leasehold premises known as the "Old Priory Inn," situate at No. 11 High Street, in the town and parish of Holywood and County of Down, made between Hugh M'Goldrick of the one part and David Adams of the other part, for an order inter alia that it might be declared that the objections of the said David Adams to the title to the premises comprised in the above mentioned contract had not been sufficiently answered, and that a good title to the said premises had not been shown.

Under the conditions of sale the premises were declared to be held under an indenture of sub-lease dated the 27th day of April, 1869, made between Henry Joy M'Cracken of the one part and Arthur Lester of the other part, whereby the said Henry Joy M'Cracken demised the said premises unto the said Arthur Lester, his heirs, executors, administrators and assigns from the day of the date thereof for and during the natural life of William M'Cormick, being the surviving cestui qui vie named in the original lease of the 1st day of April, 1812, from Simon Isaac to John Rowley and Hugh M'Cormick, under which the said Henry Joy M'Cracken now holds the said premises, and for and during the term of sixty-one years.

Hugh M'Goldrick, the present vendor, acquired the premises by an assignment dated the 3rd day of February, 1922.

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The head lease under which the said premises (with others) are held is dated the 1st day of April, 1812, the term being for three lives, of whom William M'Cormick named in the sub-lease was the survivor, and for and during the term, time and space of sixty-one years.

William M'Cormick died on the 27th day of February, 1895. By a requisition on title of the 11th day of March, 1927, the purchaser Adams raised the point that the term of sixty-one years was concurrent and not reversionary and would therefore expire in 1930, whereas it had been represented to him at the making of the contract that the term would not expire until 1956. He therefore refused to be bound by the contract and claimed the return of his deposit.

The vendor replied that the term of sixty-one years ran from the death of William M'Cormick and was not concurrent. He referred to a dismiss of ejectment proceedings brought by the head landlords against his immediate landlord at the Summer Assizes at Downpatrick in 1896.

By affidavit made in the matter of the summons, Henry Joy M'Cracken, the immediate landlord of the premises, gave particulars of the above mentioned ejectment proceedings which had been brought against himself, and deposed to having been in uninterrupted possession of the premises comprised in the head lease of the 1st day of April, 1812, since the death of William M'Cormick.

Megaw K.C. (M'Sparran with him) for the purchaser Adams:—

The term of years is concurrent and not reversionary *Duckett v. Keene* (1). The purchaser is a willing purchaser but in view of the judgments in that case and the principles laid down in it he could not get a safe title. The word "and" applies equally to a concurrent or reversionary term, but the words "from the day of the date thereof" can only apply to the creation of a term and not to a freehold interest, and these words fix the commencement of the term, so that the sixty-one years run from the date of the lease. It is very unlikely that the parties to the lease should fix as its commencement an uncertain date that might be very difficult to ascertain. Though the

words in the lease of *Duckett v. Keene* (1) differ in some respects, the reasoning of Fitzgibbon L.J. is conclusive in favour of a concurrent term.

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The affidavit of Henry Joy M'Cracken was not properly receivable in evidence, but in any case the dismiss therein referred to was *res inter alios acta*, and moreover it was overruled by *Duckett v. Keene* (1).

Murphy K.C. (*Warnock* with him) for the vendor M'Goldrick.

In *Duckett v. Keene* (1) the wording of the habendum of the lease is different from the present case "for and during the full end and term of ninety nine years from thence next ensuing." It was held that the words "from thence next ensuing" referred back to the date from which the term was expressed to run, a date different to that of execution.

It has already been decided on civil bill appeal by Palles C.B. (2) that by the habendum of the head lease, which is identical with that of the sub-lease now in question, the term of years was reversionary and not concurrent; in other words, it ran from the death of the last cestui qui vie, and the head landlords are bound by that decision.

O'Connor and Small's Contract (3) and *Blackhall v. Nugent* (4) are authorities in point.

WILSON J. :—This is an application by the purchaser Adams for a declaration that his objections to the title of the vendor under the above contract have not been sufficiently answered, and that a good title to the vendor's interest in the premises under the said contract has not been shown and for a return of the deposit and other relief.

The vendor's interest was as lessee under a sub-lease dated the 27th day of August, 1869, from Henry Joy M'Cracken to Arthur Lester for the life of William M'Cormick (since deceased) and for and during the term of sixty-one years. The head lease under which Henry

(1) [1903] 1 Ir. Rep. 409

(2) Unreported.

(3) 33 I.L.T.R. 43

(4) 5 Ir. Ch. Rep. 323.

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of sixty-one years. Mr. Adams now says that the meaning of these words is for the life of William M'Cormick and sixty-one years from the 1st day of April, 1812. It would have to mean on his contention, for the life of William M'Cormick and sixty-one years from the 27th day of August, 1869. There is only one mention of the head lease in the habendum of the sub-lease, viz., when it described William M'Cormick as "the surviving cestui qui vie in the original lease of the 1st day of April, 1812." It seems to me that in this sub-lease the sixty-one years must commence on the death of William M'Cormick, or the 27th day of August, 1869. I have no difficulty in holding that, as it has been judicially determined in relation to this very property the original term of sixty-one years ran from the death of the surviving cestui qui vie, and not from the date of the head lease, so it would be a refusal of justice to do otherwise than determine between the head lessee and his sub-lessee and between that sub-lessee, the vendor, and his purchaser Adams, that the sixty-one years mentioned in the sub-lease of the 27th day of August, 1869, run from the death of the surviving cestui qui vie, William M'Cormick.

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In my opinion in considering the construction of this lease, it should be borne in mind that the landlord prepared these leases and they should be construed as strongly as possible against him, and in case of doubt the construction most favourable to the tenant should be adopted. For these reasons, without considering critically the previous cases, I am of opinion that a good title to the vendor's interest in this leasehold has been established. I accordingly refuse the plaintiff's application and order him to pay the vendor's taxed costs.

Solicitor for the vendor : *John P. M'Cann.*

Solicitor for the purchaser : *George Martin.*

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March 7, 30

(In the Court of Appeal.)

ESTATE OF ROWAN HAMILTON.

Tenant and sub-tenant or grazing tenant—Objection to Provisional List—Jurisdiction to entertain appeal—Northern Ireland Land Act, 1925, (15 and 16 Geo. 5, c. 54), section 17 (1) (2) (3), section 33, section 36 (1)—Purchase of Land (Ireland) Act, 1885 (48 and 49 Vict. c. 73) section 22—Land Law (Ireland) Act 1881 (44 and 45, Vict. c. 49), Section 48—Irish Land Act, 1903 (3 Ed. vii., c. 37), section 24 (12) (13), section 15.

J. M'C. was the tenant from before 1861 of a holding consisting of two detached fields. The proceedings related to only one of these fields, which from about the year 1893 had been held under a seasonal letting in conacre by D.G., who continued to occupy the field until 1921. No receipts for rent were given to him. J. M'C. died in December, 1905, having by his will bequeathed his property of every kind to his nephew R. M'C. In 1921 D.G. informed R. M'C. that he did not wish to keep the field any longer whereupon R. M'C. let the field to S. H. for grazing.

The field was included in a provisional list of lands to be vested under the Northern Ireland Land Act, 1925, on an appointed day. S. H. lodged an objection to the list and the Land Commission allowed the objection, and directed that for the purposes of a new provisional list S. H. should be treated as tenant of the field.

Held, by the Court of Appeal (Andrews and Best L.JJ) that no jurisdiction to hear the appeal was conferred on the Court by the Northern Ireland Act, 1925, and further that as the finding of the Land Purchase Commission was one of fact no jurisdiction existed under the earlier Acts of the Land Purchase code.

APPEAL from an order of the Land Purchase Commission dated 24th January, 1927, allowing an objection of Sarah Heaney to the provisional list made under section 17 (2) of the Northern Ireland Land Act, 1925. Part of the lands of Corporation in the County of Down, consisting of 2 acres 1 rood 13 perches, comprised in the estate of the owner Colonel Rowan Hamilton were set forth in a provisional list as forming a holding of Robert M'Connell, the present appellant.

John M'Connell was tenant from some time prior to 1861 of a holding consisting of two detached fields, one of which was the subject matter of the present proceedings, situate near Killyleagh, Co. Down. He died in

(1) In the Court of Appeal before Andrews and Best L.JJ.

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December, 1905, having bequeathed his property of every kind to his nephew Robert M'Connell. This field from about the year 1893 had been used in conacre by David Gilmore, a cousin of Robert M'Connell, who paid to Robert M'Connell the yearly rent of £6, but no receipt for rent was given to him. In the year 1921 David Gilmore purchased an adjoining farm and told Robert M'Connell that he did not wish to keep the field any longer. Robert M'Connell then let the field to Sarah Heaney for grazing. This field was included as forming a holding of Robert M'Connell, in a provisional list published by the Land Purchase Commission under section 17 (2) of the Act of 1925.

An objection to the provisional list was lodged by Sarah Heaney against the inclusion in the list of the name of Robert M'Connell as tenant, and her interest as objector was stated to be that she and her predecessor had been in occupation of the lands as sub-tenant of Robert M'Connell for upwards of six years. The Land Purchase Commission allowed the objection. Robert M'Connell appealed to the Court of Appeal.

On the appeal being opened, Andrews L.J. questioned the jurisdiction of the Court to hear the appeal.

Hume, for the appellant, relied on section 17 of the Northern Ireland Land Act, 1925.

MacDermott, for the respondent, declined to raise the point.

[ANDREWS L.J. said that as neither party was prepared to argue the question, the Court in order to avoid unnecessary expense would hear the appeal, but would only give a decision upon it if satisfied, after consideration, that jurisdiction existed.

Hume for the appellant :—

The findings of fact of the Land Purchase Commission were wrong. The decision is erroneous in point of law. Sarah Heaney was not and could not be a sub-tenant within the meaning of the Northern Ireland Land Act, 1925. There was no right to sub-let within the meaning of section 2 of the Land Law (Ireland) Act, 1881. Sarah Heaney was a grazing tenant, and not an ordinary sub-tenant.

I rely on *Fogarty v. Shannon* (1) where it was held that an assignment by a tenant from year to year of a holding,

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to which the Land Law (Ireland) Act, 1881 applies, of portion of such holding, is absolutely and for all purposes void, unless and until the landlord has consented in writing as required by section 2 of that Act. I also rely on *Joyce v. Harrington* (1). If this was a sub-letting in the full sense of the term it was void and illegal.

MacDermott for the respondent :—

No point as to the legality of the sub-letting was made in the Court below, nor even in the notice of motion.

There is no evidence that the landlord did not give his consent to the sub-letting. Verbal consent would be sufficient : *Boyd v. Tredenick* (2). It has not been shown that this is a void sub-letting. A person may be an ordinary tenant, even although he only uses the land for grazing purposes. Any person in possession of land is presumed to be an assignee until the contrary is shown *Sweeny v. Sweeny* (3). The findings of the learned Commissioner both on the facts and in point of law were correct.

March 30

ANDREWS L.J. : This is an appeal from an order of the Land Purchase Commission, dated 24th January, 1927, whereby the Commission allowed the objection of one Sarah Heaney to the provisional list made in this matter under section 17 (2) of The Northern Ireland Land Act, 1925. In the provisional list part of the lands of Corporation in the County of Down, consisting of 2a. 1r. 13p., comprised in the estate of the owner Colonel Rowan Hamilton, were set forth as forming a holding of one Robert M'Connell, the present appellant. The objection of Sarah Heaney was against the inclusion in the list of the name of Robert M'Connell as tenant, and her interest as objector was stated to be that she and her predecessor had been in occupation of the lands as sub-tenant of the said Robert M'Connell for upwards of six years. Her legal right to be treated as tenant if a valid sub-tenancy was proved, is clearly established by section 14 of the Act of 1925, and is not challenged.

The owner, Colonel Rowan Hamilton, did not contest the right to the inclusion of the lands in the provisional

list, and he was neither interested in nor represented at the hearing.

On the opening of the appeal I raised the question of this Court's jurisdiction to entertain the appeal. Mr. Hume, for the appellant, referred us to section 17 of the Act of 1925, the other two sections of that Act which confer jurisdiction on the Court of Appeal, namely, sections 16 and 18, being admittedly irrelevant. Mr. MacDermott, for M'Connell, declined to raise the preliminary point; and as neither party was prepared to argue the question we decided, in order to avoid unnecessary expense, that we would hear the appeal but would only give a decision upon it if we were satisfied, after consideration of the matter, that jurisdiction existed. I regret to say that the further investigation which I have now had an opportunity of making confirms my first impressions as to the non-existence of such jurisdiction.

Our jurisdiction in cases arising under the Land Purchase code is of two-fold character: first, that which is expressly conferred by the Act of 1925; and secondly, that which existed under the earlier Acts. Such jurisdiction being statutory must, it is unnecessary to say, conform strictly to the provisions of the statutes. Dealing first with the Act of 1925 it is provided by sub-section (1) of section 17 that it is the duty of persons entitled to the rents and profits of land to furnish to the Commission information in writing with respect to the land as therein specified. Sub-section (2) provides that the Commission shall from time to time publish provisional lists of the land which will become vested in the Commission . . . together with notice of the manner in which and the time within which objections may be made to the list by reason of the inclusion or non-inclusion therein of any land. . . . Sub-section (3) then provides that the Commission shall consider and adjudicate upon any objections duly made, and that an appeal shall lie from any decision of the Commission on such objection to the Court of Appeal in Northern Ireland and the decision of the Court of Appeal shall be final.

It is, therefore, a condition precedent to the jurisdiction of this Court that the objection should have been "duly

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made," and the only form of objection authorized by the terms of the section is one which relates to the inclusion or non-inclusion of any land in the list. That is a matter which raises an issue directly between the owner and his tenant, and not as between tenant and sub-tenant or grazing tenant.

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My view that the objection lodged by Sarah Heaney is not a proper objection to the provisional list is, I think, confirmed by the provisional rules made on 29th May, 1925, under the provisions of section 33 of the Act and the forms scheduled therein. Thus, rules 2, 3, and 5 of Order IX. all refer to objections to the provisional lists "by reason of the inclusion or non-inclusion therein of any land," and Form 10 which is headed "Objection to provisional list of lands by reason of the inclusion or non-inclusion of any land therein" is so drawn as to be confined to an objection of that character. It is true that rule 6 of Order IX. provides that "Any person objecting to a provisional list by reason of any misdescription of a holding therein or for any other similar reason may apply to the Commission to have such error rectified." This rule is somewhat vague—perhaps designedly so; but I shall only say that if it is intended to provide for an objection not sanctioned by the Act of 1925 or earlier legislative authority it would be entirely *ultra vires*. Furthermore, it is a rule of the Land Purchase Commission, and cannot effect the jurisdiction of this Court to entertain the appeal, which is the only subject into which we are inquiring, and upon which alone I wish to express any concluded opinion.

We must look therefore for jurisdiction beyond the Act of 1925, and in passing from that Act I merely desire to refer to section 3 (1) which, declares that it shall be construed as one with the Land Purchase Acts and may be cited with those Acts. I therefore look to see the jurisdiction possessed by the Court of Appeal under the Land Purchase code prior to the passing of the Act of 1925. Section 22 of The Purchase of Land (Ireland) Act, 1885, as amended by the Statute Law Revision Act, 1898, reads as follows:—
"Notwithstanding anything contained in the 48th section

of the Land Law (Ireland) Act, 1881, to the contrary, any person aggrieved by a decision made on a question of law in proceedings under this Act may appeal from such decision to the Court of Appeal in Ireland."

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The extent of this right of appeal was considered in several important cases. It was, as Palles, C.B., pointed out in *In re Kemmis's Estate* (1), a modification of section 48 of the Act of 1881, which excluded from the category of appealable orders those under the Land Purchase provisions of the Act; but, as he further mentioned, it was a modification which related to decisions on questions of law only. This latter point was again stressed by the same learned judge in *In re Talbot Crosbie's Estate* (2), in which the Court of Appeal held that section 24 (12) of the Irish Land Act, 1903, does not take away the general right of appeal under section 22 of the Act of 1885 from an order of the judicial Commissioner to the court of Appeal. At page 574 Palles, C.B., dealing with the law as it existed prior to the Act of 1903, pointed out that if a decision of the Land Commission involved a question of law there was a direct appeal to the Court of Appeal, but that it was different when the matter involved was one of fact, and that from such an order no appeal lay to that court. In this state of the law it was, he added, one object of section 24 (13) to extend the right of appeal from decisions under that section to cases in which that which was in controversy was matter of fact or matter of mixed law and fact. This right of appeal as so extended is, however, expressly limited to appeals from decisions under that section, which relates to the distribution of purchase money, and, accordingly, it does not apply to a question as to the existence or non-existence of a sub-tenancy, which was the only point argued before the Land Purchase Commission in the present case.

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In *In re Patrick Leonard's Estate* (3) the right of appeal under section 22 of the Act of 1885 was held to apply to a decision upon any question of law determined by an order made under section 32 (3) of the Land Law (Ireland) Act,

(1) [1904] 1 I.R. 496² at p. 506

(2) 1905 1 I.R. 570

(3) [1912] 1 I.R. 212

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1896. Referring to *In re Talbot Crosbie's Estate* (1) Holmes, L.J., said at p. 228 that it was there held that the effect of section 22 was that the right of appeal existed where a question of law was decided under any statute that was declared to be construed as one with the Land Purchase Acts unless a contrary intention was shown. The importance of this passage is apparent when the words of section 36 of the Act of 1925 to which I have already referred are borne in mind.

Other cases to the like effect could be cited, but I shall only refer to one—*In re Estate of John Scully* (2)—which related to the right of appeal where a question, though admittedly a different question, arose affecting the position of a sub-tenant. Cherry, L.J., referred to *In re Leonard's Estate* (3), and the court held that the right of appeal existed as the question at issue was purely one of law, and that section 15 of the Act of 1903 which related to sub-tenancies did not take away, either expressly or impliedly, the right of appeal from the Judicial Commissioner. This right of appeal under section 22 of the Act of 1885 on questions of law arising under the Land Purchase Acts applies now by virtue of section 40 of the Government of Ireland Act, 1920, Articles 1 (4) and 2 (1) of The Supreme Court of Judicature (N.I.) Order, 1921 (4) and Articles 3 and 7 of the Land Purchase (Northern Ireland) Order, 1923 (5) to appeals from the Land Purchase Commission to the Court of Appeal in Northern Ireland.

In this state of the law it only remains to consider the precise nature of the issues involved in this appeal. It appears clear from the shorthand notes that the only question to which either evidence or argument was directed at the hearing was whether Mrs. Heaney's interest was that of a sub-tenant from year to year or whether she only held under successive seasonal lettings for grazing purposes. This is purely a question of fact, from a decision upon which no appeal lies.

In this court Mr. Hume sought to raise the further point that if the intention of the parties was to create a sub-

(1) [1905] 2 I.R. 570 (2) [1912] 1 I.R. 231

(3) 1912 1 I.R. 212

(4) Imp. S.R. & O. 1921 No. 1802 (5) Imp. S.R. & O. 1923 No. 615

letting from year to year it was illegal by virtue of the provisions of section 2 of the Act of 1881 as having been made without the consent in writing of the landlord. I respectfully decline to consider this argument for several reasons. In the first place, it should have been raised, if at all, before the Land Purchase Commission, though I am not to be understood as deciding that in a proper case this Court may not on terms entertain a point which was not brought before that tribunal. Secondly, we have no evidence as to whether the consent of the landlord was or was not given in writing, and I refuse to indulge in idle speculations or to go into questions of nicety in this court as regards onus of proof of a fact, the existence of which was assumed by both parties and is necessarily involved in the decision of the court. It is obviously a case in which this court should apply the maxim "*Omnia praesumuntur rite esse acta.*" Thirdly, in my opinion it would not be right for us to support an appeal, from what was on the question determined by the Land Purchase Commission an unappealable order, by the introduction of an entirely new issue in this court. And, lastly, if the point had been raised where it ought to have been, before the Commission, there would really have been no question of law for determination by this Court, as an issue in regard to the existence or non-existence of the necessary consent to subletting is purely one of fact, from the ascertainment of which indisputable legal consequences necessarily follow. I should perhaps add that no formal application was made to us to refer the matter back to the Commission for their finding on this question.

For all these reasons I hold we have no jurisdiction to entertain this appeal, and we shall therefore make an order so reciting and declaring that the appeal be struck out without costs.

BEST, L.J. :— In this case Robert M'Connell appeals from an order of the Land Purchase Commission, dated the 24th day of January, 1927, by which it was declared that the objection of Sarah Heaney to the provisional list of tenants in the above matter was allowed, and it was directed that for the purposes of a new provisional list,

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and the proceedings consequent thereon, the said Sarah Heaney should be treated as the tenant of a small parcel of land containing 2 acres 1 rood 13 perches situate near Killyleagh, in the County of Down.

Robert M'Connell is tenant of certain lands on the above estate, and the parcel of land with which this case is concerned had been let to Sarah Heaney. The provisional list No. 192 of lands which were to become vested in the Land Purchase Commission was objected to by reason of the inclusion in the said list of the name of Robert M'Connell as tenant of the holding in question; and it was stated in the notice of objection that the interest of the objector in the lands was that she and her predecessor had been in occupation thereof as sub-tenant of the said Robert M'Connell for upwards of six years.

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There was no one to dispute the proposition that the land in question is tenanted land to be vested in the Commission, pursuant to the provisions of section 8 of the Northern Ireland Land Act, 1925, and the sole question for determination by the Land Purchase Commission was whether Robert M'Connell was the tenant of the land in dispute, or whether Mrs. Sarah Heaney was a sub-tenant within the meaning of section 14 (1) (c) of the Act. The Commission made an order in favour of Mrs. Heaney, which is the order appealed from.

At an early stage in the argument before this court a doubt arose as to whether an appeal lay in the case, but we decided to hear counsel on the assumption that it did lie, and intimated that we should consider the matter. I have come to the clear conclusion that the order of the Land Purchase Commission directing that Sarah Heaney be treated as tenant of the holding is not appealable. Section 14 of the Act contains provisions as to resales by the Commission of tenanted land vested in them to sub-tenants of the lands or portions thereof; and it is, in my opinion, a necessary consequence from the provisions of that section that the Land Commission must decide whether there is in a particular case a sub-tenant, and what is the nature of the tenancy, i.e., does it come under (a), (b) or (c) of sub-section (1) of the section. No appeal from a decision under this section is expressed to be given.

An appeal to this Court is given in sections 16, 17 and 18 of the Act. The appeals in sections 16 and 18 deal

respectively with questions of mineral rights and the subdivision of holdings containing building ground, and can have no application to this case. It is suggested that the appeal provided for in section 17 sub-section (3) is applicable in this case, but with this view I cannot agree. The appeal given by this sub-section is "from any decision of the Commission on such objection," and the objection is one made "to the list by reason of the inclusion or non-inclusion therein of any land." The land in this case is admittedly to be included either in the name of Robert M'Connell or of Sarah Heaney, and it was open to the Commission under the provisions of section 14 of the Act to determine whether Mrs. Heaney is or is not a sub-tenant; and as already stated no appeal from a determination under this section is given.

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For the reasons further stated by Lord Justice Andrews I am of opinion that no appeal in a case such as this, involving as it does the determination of a question of fact, lies under the provisions of any Land Purchase Act prior to that of 1925, and as it has not been given by this latter Act, our decision must be that we have no jurisdiction to hear the appeal, which, accordingly, must be struck out without costs.

Solicitors for the appeallant : *Martin and Henderson.*

Solicitors for the respondent : *Johnston and M'Court.*

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[In the Court of Appeal.]

LOWRY v. REID (1).

Parol contract relating to Land—Statute of Frauds (7 Wm. 3 c. 12) s. 2—Part performance by party seeking to enforce contract).

A mother undertook verbally to make a will leaving to her son W.L. her two farms of land in D. and thereby induced W.L., the plaintiff, to convey his farm in B. to his brother A.L., and to pay A.L. the sum of £200. She afterwards made a will which gave effect to this verbal undertaking, but subsequently revoked it, leaving W.L. merely a life interest in the two farms.

Held, by the Court of Appeal (Moore L.C.J., Andrews and Best L.JJ.) reversing Wilson J., that W.L., having given up his own property to his detriment on the faith of his mother's representations, was entitled to a decree for specific performance to carry these representations into execution, and that acts of part performance by W.L. were sufficient to take the case out of the operation of the Statute of Frauds (7 Will. 3, Ir. c.12) s. 2.

APPEAL from the judgment of Wilson J. in an action in the Chancery Division for (a) a declaration that the defendants held the reversion expectant on the life estate of the plaintiff in the lands of Drumhirk, in the County of Down, comprised in folios Nos. 8226 and 8227 of the Register of Freeholders, County of Down, as trustees for the plaintiff, the life estate and reversion having been created by the will of Mary Lowry, deceased, dated May 1st, 1923;

(b) specific performance of a contract made about the month of April, 1916, between the plaintiff and Mary Lowry deceased, whereby Mary Lowry agreed to leave by her will her lands above referred to to the plaintiff in consideration of the plaintiff conveying to his brother Andrew Lowry his farm of land, also situate in Drumhirk.

The facts of the case were as follows :—On 27th January, 1894, William Lowry, plaintiff's father, died intestate leaving a widow, Mary Lowry, and six children, Annie,

(1) In the Court of Appeal before Moore, L.C.J., Andrews and Best, L.JJ.

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William (the plaintiff), Hugh, James, Andrew, and Robert. William Lowry had at his death two farms of land, one containing 74ac. 0r. 2p., held under Mr. Dunville and situate at Drumhirk, Co. Down, and the other containing 115a. 1r. 2p. in Ballykeigle, Co. Down, held under Mr. Gordon. On 16th March, 1894, Mary Lowry, the widow, took out administration to the estate of her deceased husband. On 16th August, 1902, a family settlement was arrived at, and all the members of the family joined in a deed of release of that date by which the entire property of the deceased was vested in Mary Lowry, freed and discharged from all claims by the children as next-of-kin of the deceased or otherwise howsoever.

On 21st August, 1902, Mary Lowry made a will by which she left the farm at Drumhirk (74 acres) to Andrew Lowry charged with legacies of £200 each to her children, Annie Reid, James Lowry, and Robert Lowry, payable three years after her death, and she left the farm at Ballykeigle (115 acres) equally between William and Hugh as tenants in common, and left her stock, implements, chattels, household furniture, etc., to be divided equally between Andrew, William, and Hugh, and left the residue of her property to her children equally. After this will the 115 acre farm was divided and bought out. Hugh got 67 acres of it and was duly registered as owner thereof, and William, the plaintiff, got the balance, 48 acres and £200 (as there was no house on this portion), and was duly registered as owner thereof on Folio No. 2805 Register, County Down. This was in 1904 or 1905, and Hugh and William each went into possession of their farms.

On 16th September, 1905, Mary Lowry made another will by which she bequeathed the farm at Drumhirk of 74 acres to Andrew, subject to certain legacies, and left the residue of her property, except her household furniture and effects, in equal shares to Andrew and William, and bequeathed her household effects to Andrew, and appointed Andrew and William her executors. Mary Lowry, the widow, had the 74 acre Drumhirk farm divided, and was registered as owner of the two portions when bought out, on Nos. 8226 and 8227 of the Register of Freeholders, County Down. The position of this family from about

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1908 till 1916 was, Mrs. Annie Reid was married and away; Hugh was married, living on and working his 67 acre farm in Ballykeigle; William was working his 48 acres in Ballykeigle, living with his mother in Drumhirk and assisting her with her 74 acre farm; James had started in business on his own account; Andrew was in Liverpool and Robert was in New Zealand. When the war broke out Andrew in Liverpool was called up, and came home invalided in 1916. William Lowry, the plaintiff, was about to get married, and had talked of selling his 48 acres farm and going with his wife to another farm. His mother, Mary Lowry, wanted William and his wife to come and live with her on Drumhirk as William had done up to that time, and she wanted Andrew to get a farm and not have to serve any more. On the suggestion of Mary Lowry a verbal agreement was entered into between Mary Lowry, Andrew Lowry, and William Lowry, by which Mary Lowry agreed that she would give to William Lowry at her death her two farms of land in Drumhirk, formerly held under R. E. Dunville, but which she had purchased out, subject to the payment of £200 to her son James Lowry and of £200 to her son Robert Lowry, these legacies not to be paid till three years after her death, and that she would also give him at her death her household furniture and household effects, and would at the same time give all the rest of her property, including all stock, crop, chattels, implements and outside effects on her farms to William Lowry and Andrew Lowry in equal share and proportion, in consideration of William Lowry conveying at the request and by the direction of Mary Lowry his farm of 48 acres in Ballykeigle, of which he was registered owner on Folio No. 2805 Register, Co. Down, forthwith to Andrew Lowry and paying him £200. This was the sum which William Lowry had got on account of their being no house on this 48 acres farm. The day after the agreement was entered into, Mary Lowry sent her two sons William and Andrew to the family solicitor, Mr. John M'Kee, to give him instructions to have the necessary will prepared for her. They gave him the instructions, but he insisted on seeing Mary Lowry before making the will, and she came to his office. He read over the instructions to her, she approved of them, and the will of 29th April, 1916, was duly executed by Mary Lowry.

A few days later William Lowry conveyed his farm of 48 acres to Andrew Lowry, and Andrew was duly registered as owner and went into possession. He remained in possession of this farm until 1920, when he sold it to his brother Hugh for £350. William Lowry also paid Andrew £200 which he had got on the original transfer of this farm to himself. William Lowry got married, brought his wife to live with his mother at Drumhirk and lived there, working his mother's farm till her death. After Andrew Lowry had sold his 48 acres farm to his brother Hugh, Mary Lowry said to William as Andrew is giving up his farm and going back to business, he will not want the chattels, stock, crop, implements, and outside effects, which I left him by my will, and you should pay him for his share, and if you do I will leave them all to you. William Lowry agreed to do so, and asked Mary Lowry what was their fair value, and it was agreed between them that if William Lowry would pay Andrew Lowry £250 she would leave her stock, crop, chattels, implements, and outside effects to William Lowry. William Lowry paid Andrew £250, and Mary Lowry wrote to Mr. M'Kee saying, "I wish to make a slight alteration in the will you made for me some time ago, the chattels, stock, crop, etc., that was to be divided between my sons William Lowry and Andrew Lowry is now all to go to my son William Lowry, my son Andrew having been paid £250 in lieu of same." In accordance with this letter Mr. M'Kee prepared and Mary Lowry duly executed a codicil dated 10th January, 1920, to her will of 29th April, 1916, as follows: "I, Mary Lowry, of Drumhirk, in the County of Down, widow, hereby make this as a codicil to my last will. Whereas my son William Lowry has paid to my son Andrew Lowry a sum of £250, I hereby revoke the bequest contained in my said will dated 29th April, 1916, to my son Andrew, and in lieu thereof I hereby bequeath all my stock, crop, chattels, implements and outside effects to my son William Lowry, and I confirm my said will in all other respects." Andrew with his £600 went off to Liverpool. William and his wife continued to live with Mary Lowry at Drumhirk.

On 1st May, 1923, Mary Lowry made a new will, revoked all previous wills and codicils, appointed her son-in-law, the defendant Thomas C. Reid, and her son

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William Lowry her executors. She devised her farm in Drumkirk, containing 74 acres 0r. 25p. to the plaintiff William Lowry for his life, and on his death to his child or children in equal shares, and should the plaintiff leave no issue then surviving the said farm was to go to her grandson, the defendant Thomas C. Reid, Junior, for his own use and benefit absolutely. She left and bequeathed all the residue and remainder of her property, including all stock, crop, chattels, implements, and outside effects on and about her said farm, and all her household furniture and effects to her grandson Thomas C. Reid absolutely.

Mary Lowry died on 10th February, 1925, and the defendant Thomas C. Reid, Senior, took out probate of this will on 22nd July, 1925.

WILSON J. held that the plaintiff did not give away his farm of 48 acres, or his £200 in 1916, or his £250 in 1920 on anything short of a contract and bargain with his mother which bound her to leave him the benefits mentioned in the will of 29th April, 1916, and the codicil of 10th January, 1920. In as much as it was a contract relating inter alia to land, as it was not in writing, and there was no note or memorandum of it sufficient to satisfy the Statute of Frauds, no action could be brought on it, unless there was sufficient part performance to take it out of the statute. As to part performance, he held following *Madison v. Alderson* (1) that there had not been such part performance as to take the case out of the operation of the Statute of Frauds, s. 2.

As to the second contract made in 1920, he held that the plaintiff was entitled to succeed, as Mary Lowry agreed to leave him the entire of the stock, crop, chattels, implements, and outside effects on the farms at her death, and such agreement was binding.

The plaintiff appealed to the Court of Appeal from the order of Wilson J. in so far as it related to the lands

Williamson K.C., E. S. Murphy, K.C. and Lowry K.C. for the plaintiff :—

We submit (a) that there is a sufficient note or memorandum in writing to take the case out of the opera-

tion of the Statute of Frauds, s. 2; (b) that there has been sufficient part performance with the same effect; (c) that there is an equity binding on the conscience of the deceased, to leave by will the farm to the plaintiff, and that this equity is binding on the defendants. The plaintiff has by his notice of motion applied for leave to produce additional evidence, viz.—the evidence of Andrew Lowry relating to the circumstances in which he made his last will dated 25th April, 1916, and to read this last will.

[MOORE L.C.J. : We do not feel disposed to admit this evidence.]

It is clear that there was a contract, and that part performance of that contract takes it out of the operation of the Statute of Frauds. Part performance need not be by the party to be charged. The making of the will and codicil was, we submit, part performance. The whole evidence in the case shows conclusively that there was a contract. We rely on the will itself and the instructions to Mr. M'Kee as constituting a sufficient note or memorandum.

As to the question of the existence of an equity binding on the conscience of the deceased, we rely on *O'Hanlon v. Murdock* (1). Fry on Specific Performance (6th edition), p. 288, par. 608, lays down that "The same principle applies in cases of family arrangements involving the giving up, partition, or exchange of land; so that though such arrangements may be by parol, yet if they be followed by uninterrupted exclusive enjoyment of the several lands in pursuance of the arrangement, the Court will specifically enforce them."

The Statute of Frauds is not to be used to perpetrate a fraud. *Maddison v. Alderson* (2) does not apply to the present case. The decision in *United States v. Motor Trucks, Ltd.* (3) is wholly consistent with *Maddison v. Alderson* (2). We rely on *In re Duke of Marlborough*, *Davis v. Whitehead* (4), which we submit governs the present case.

Wilson J. did not take a correct view of the doctrine of part performance. The plaintiff has performed his part of the contract, and the defendants are in no better posi-

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(1) [1901] 1 I.R. 122.

(2) 8 A.C. 467.

(3) [1924] A.C. 196.

(4) [1894] 2 Ch. 133.

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tion than the late Mrs. Lowry was. We submit that the law is correctly stated in Fry on Specific Performance (6th edition), page 276, par. 578—"The part performance of a contract by one of the parties to it may, in the contemplation of equity, preclude the other party from setting up the Statute of Frauds." *Caton v. Caton* (1) expressly recognizes the principle for which we are contending. We rely also on *M'Manus v. Cooke* (2).

M'Gonigal K.C., Pringle K.C. and Ellison for the defendant Thomas C. Reid, Junior:—

We submit that the judgment of Wilson J. was right. The letter written by the deceased to the solicitor Mr. M'Kee did not refer to the lands at all, nor is there any such reference contained in the codicil to the will. We suggest that there was no contract of any kind. The members of this family had evidently great trust in their mother, and as a matter of family arrangement, William Lowry was to hand over the farm which he then had to his brother Andrew, and if he did so, his mother said she would leave her farm to him, by her will. We submit that this was not a contract, but a mere promise dependent on the honour of the mother. If it had been meant to be a contract, the terms would have been reduced to writing, or a deed would have been drawn up. It is perfectly clear that Mr. M'Kee, the solicitor, did not look upon this arrangement as a binding contract.

We submit that this case is covered and governed in practically every aspect by the decision in *Maddison v. Alderson* (3). Acts of part performance must be capable of being unequivocally referred to some such contract as is alleged here and to no other. It is quite possible to refer these acts of part performance to quite a number of other contracts. We rely on *Chaproniere v. Lambert* (4). We submit that the verbal evidence admitted by Wilson J. that the consideration appearing on the deed was not the real consideration was wrongly admitted. The evidence contradicting the deed should never have been admitted.

(1) L.R. 1 Ch. 137.

(2) 35 Ch. D. 681.

(3) 8 A.C. 467

(4) [1917] 2 Ch.D. 356.

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To admit evidence of acts of part performance results, in a case where the Statute of Frauds is relied on, in the very mischief at which the statute was directed.

We submit that this ground of fraud was never pleaded, and is quite untenable. The decision in *O'Hanlon v. Murdock* (1) is quite distinguishable, and so is that in *In re Duke of Marlborough, Davis v. Whitehead* (2). There is no evidence of any contract referred to or constituted by any of the writings that have been produced. The instructions written down by Mr. M'Kee are not admissible. We rely on *Humphreys v. Green* (3).

Mere hardship is not sufficient to establish an equity and to enable the court to give relief.

Upon all the facts of the case we submit that Wilson J.'s decision was right. [They also referred to *Jorden v. Money* (4).]

Murphy K.C., in reply :—The conference between Mrs. Lowry and Mr. M'Kee resulted in the will of 1916. The family arrangement in 1916 was completely executed on both sides. The dates of these matters are to be taken into consideration as part of the *res gestae*. Every case would be consistent with bounty, and the logical result would be that in no case of specific performance would an act of part performance be of the slightest value. In *Madison v. Alderson* (5) there was absolutely nothing that would amount to an act of part performance. The court must necessarily have parol evidence in regard to every act of part performance.

In *Rex v. Scammonden* (6) Lord Kenyon Ch.J. said : " It was clear that the party might prove other considerations than those expressed in the deed." In *Clifford v. Turrell* (7) it was held that where there is one consideration stated in a deed, proof may be given of any other consideration which did take place, and which is not in contradiction to the instrument; and it is not in contradiction to the instrument to prove a larger consideration than that

(1) [1901] 1 I.R. 122
 (2) [1894] 2 ch. 133
 (3) 10 Q.B.D. 148
 (4) 5 H.L.C. 185

(5) 8 A.C. 467.
 (6) 3 T.R. 474
 (7) 1 Y. & C. C.C. 138.

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which is stated. In *Frith v. Frith* (1) Lord Atkinson adopted the principle laid down in *Clifford v. Turrell* (2). *Jorden v. Money* (3) is, we submit, of no assistance in the present case. That case only decided that if reliance is to be placed on representations, those representations must be of existing facts. We rely upon *Conner v. Fitzgerald* (4).

Cur. adv. vult.

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MOORE L.C.J. : This was an action by William Lowry, upon a contract made between his deceased mother, Mary Lowry, and himself on or about April 28th, 1916, under which the plaintiff, at the request of his mother, transferred his farm of forty-eight acres to his brother Andrew, and in return Mary Lowry undertook to plaintiff that she would by will devise and bequeath to him at her death her own farm of seventy-four acres and twenty-six perches.

Two years before her death, on 1st May, 1923, Mary Lowry revoked the previous will which she had made in pursuance of the contract above stated, and left the plaintiff a life interest merely in said farm, and (after limitations not now material) the ultimate interest to her grandson, Thomas Carlisle Reid, Junior, one of the defendants.

Wilson J. at the trial held, as appears both from his spoken judgment and the order, that the contract alleged by the plaintiff was in fact made, but that it could not be enforced as against the representatives of Mary Lowry, inasmuch as it was a contract relating to land, and there was no sufficient note or memorandum in writing signed by Mary Lowry as required by the Statute of Frauds, and that there had not been any sufficient part performance of the contract by Mary Lowry to take the contract out of the provisions of that statute. On these grounds he dismissed the action so far as it related to the lands, and from this judgment William Lowry has appealed.

Counsel for the defendant, however, have admitted that they cannot sustain the order of the learned judge on this

(1) [1906] A.C. 254
(2) 1 Y. & Col. 138.

(3) 5 H.L.C. 185.
(4) 11 L.R.I. 106.

ground, and it is admitted before us that if there is part performance by the party seeking to enforce a contract that is sufficient to bind both, and acts by the person to be charged are not in themselves evidence of acts of part performance. See *Caton v. Caton* (1).

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But counsel for the respondents have attempted to put the case on a different ground based on certain dicta in the judgment of Lord Selborne in *Maddison v. Alderson* (2). They say that evidence of the parol contract cannot be admitted unless it is first established that the alleged acts of part performance unequivocally establish the existence of some such contract. If I have correctly stated this proposition, I can only say that I do not accept it. I think it is an inversion of the principle which should obtain. In my opinion, we must at some stage consider the contract and its effect, before we are in a position to judge, whether or not the acts relied on to take the case out of the statute are acts of part performance of the contract.

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If such acts are not unequivocally referable to the performance of the contract, in whole or part, then the evidence as to them is irrelevant and the necessary proof of part performance fails. Lord Selborne's speech in *Maddison v. Alderson* (2) lays it down that "the doctrine of part performance is applicable to any case in which a court of equity would before the statute have decreed specific performance." These are the words of Palles C.B., in *Crowley v. Sullivan* (3), at p. 492. In this case, therefore, I take the parol contract and I find it proved as set out in paragraph 5 of the statement of claim. What facts do we find as proving acts of part performance unequivocally referable to this contract? First of all as to the status ante quo—(a) That on 16th August, 1902, Mary Lowry was possessed of two farms, one of which was subsequently divided into two. (b) That on 21st August, 1902, she made a will whereby she left the 74 acres at Drumhirk to Andrew (I omit the charges for legacies) and the 115 acre farm at Ballykeigle to William and Hugh jointly. (c) That the Ballykeigle farm, at Mary Lowry's wish, in 1905 was

(1) L.R. 1 ch. 137

(3) 2 I.R. [1900] 478

(2) 8 A.C. 457

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divided between Hugh and William, and William became registered owner of 48 acres of it, and Hugh of the balance, leaving Mary Lowry in possession of the Drumhirk farm of 74 acres. This was the position except for one further factor immediately prior to the parol contract of April, 1916, of which specific performance is sought in the present action. That further factor was that William was about to get married, and, as he had no house on his farm at Ballykeigle, he was about to sell it and buy another elsewhere.

At this stage then the mother, being anxious to keep William at home and also to provide for her son Andrew, who had been invalided from the Great War, makes a new arrangement in the nature of a re-settlement. (I purposely omit all references to legacies, chattels, etc.) She said to William, in effect, "if you will now give up possession of your 48 acres of land to Andrew, and come and live with your wife with me and help me to work my 74 acres, I will leave you the 74 acres at my death." Now has there been such part performance of that contract as would entitle William to succeed in equity in a suit for specific performance? Would it be a fraud on the part of Mary Lowry to take advantage of the fact that there was no contract in writing pursuant to the statute?

With this in mind, let us see what occurred. William, immediately after the contract, puts Andrew in possession of his 48 acres, and with his wife retires to live with his mother on her farm. Mary Lowry on her part makes a will leaving her farm to William pursuant to the arrangement. This is not relied on as an act of part performance but as an act corroborating the making of the parol contract. William, having transferred his own farm, lives on with his mother who ultimately dies, leaving him only a limited interest; the learned judge says he has been defrauded and that for him there is no relief. In my judgment there is relief for him, because on the facts of the case, having given up his own property to his own detriment, on the faith of his mother's representations, this is a parol contract for the specific performance of which he is entitled in equity to a decree to carry those representations into execution, and if he is entitled to such a decree,

he is equally entitled to rely on the doctrine of part performance to take the case out of the statute, *Crowley v. O'Sullivan* (1).

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In my opinion, the plaintiff, William Lowry, is entitled to judgment in the terms of his notice of appeal, and in that respect the judgment of Wilson J. should be reversed and altered accordingly. The plaintiff, who should have succeeded in the court below, is entitled to his costs of the action there as well as the costs of this appeal, to be paid by the executor and his co-defendant.

ANDREWS L.J. : I entirely agree with Wilson J. in the conclusion of fact at which he arrived in this case, namely, that in the year 1916 a valid verbal contract was entered into between Mary Lowry and her sons, Andrew and William, by which Mary Lowry agreed that she would leave to William at her death her two farms of land in Drumhirk, subject to certain legacies, and also her furniture and household effects, and that the residue, including all stock, crop and outside effects, should be divided between William and Andrew in equal shares. In return for and as the consideration for this undertaking William Lowry agreed to convey his farm of 48 acres in Ballykeigle to Andrew Lowry and to pay him the sum of £200.

We are not concerned on this appeal with the variation in the terms of this agreement which found expression in the codicil of 10th January, 1920, as it only affected that portion of the contract which related to the stock, crop, and outside effects. The appeal relates to the rights of the rival claimants to the lands in Drumhirk; and the only assistance which we derive from further reference to that portion of the contract which contained the proposed disposition of the stock, crop, and outside effects, is that the defendants have not challenged Wilson J.'s decision of that part of the action in the plaintiff's favour, and must, therefore, be taken to have acquiesced in his view as to the existence of a valid contract affecting such stock, crop, and outside effects. The attitude of the defendants concerning this part of the agreement confirms the opinion at which I have independently arrived, that the agreement

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between the mother and her sons extended to the lands of Drumhirk. The only question, therefore, to be determined is whether it is an agreement which is capable of being legally enforced at the plaintiff's suit.

I further agree with Wilson J. that there is no sufficient note or memorandum of this parol agreement to satisfy the provisions of the Statute of Frauds; and, accordingly, the plaintiff must fail unless there has been a sufficient part performance of the contract to take the case out of the statute. Wilson J. held that the performance by William Lowry is complete. I agree. William conveyed all his estate and interest in the 48 acre Ballykeigle Farm to Andrew, who forthwith entered into and remained in possession until he sold it to his brother Hugh in 1920. William also paid Andrew the £200 agreed upon. But Wilson J. held that it was necessary that there should also be a part performance of the contract by Mary Lowry, and that the making of the will of 19th April, 1916, and her allowing William to bring his wife to live at Drumhirk did not amount to such part performance.

When one considers the principle upon which the doctrine of part performance is based, it becomes, in my opinion, clear that no such performance on her part is required. In *Bond v. Hopkins* (1) Lord Redesdale said:—"The Statute of Frauds says that no action or suit shall be maintained on an agreement relating to lands which is not in writing, signed by the party to be charged with it; and yet the court is in the daily habit of relieving, where the party seeking relief has been put into a situation which makes it against conscience in the other party to insist on the want of writing so signed, as a bar to his relief." Thus the doctrine is a purely equitable one. Its underlying principle is, that the Court will not allow a statute which was passed to prevent fraud to be made itself an instrument of fraud. In other words, the court disregards the absence of that formality which the statute requires when insistence upon it would render it a means of effecting, instead of a means of averting, fraud. The question in each case is, whether the plaintiff has an equity arising from part performance which is so affixed upon the conscience

(1) 1 Sch. & L., 413 at 433.

of the defendant that it would amount to a fraud on his part to take advantage of the fact that the contract is not in writing. The right to relief rests not so much on the contract as on what has been done in pursuance or in execution of it. Under the statute the note or memorandum of the contract must be signed by the party to be charged. Under the doctrine of part performance the equity must be possessed, not by the party to be charged, but by the plaintiff—the person who seeks relief; and this equity arises from his part performance of the contract. This view is not only recognized by all the leading text book writers on the subject, but it has also been enunciated in the clearest terms by Lord Cranworth, C., in the English Court of Appeal in the case of *Caton v. Caton* (1), in terms which were approved of by the House of Lords in the same case (2). “The preparing and executing of the will,” said Lord Cranworth C., at p. 148, “caused no alteration in the position of the lady (i.e., the plaintiff), and I presume it will not be argued that any consequence can be attached to acts of part performance by the party sought to be charged.” In the House of Lords the plaintiff’s counsel did not challenge this view of the law; and, abandoning any argument based on alleged part performance, they sought, unsuccessfully as it proved, to establish that a certain paper constituted a contract within the statute. In his speech Lord Chelmsford, however, left no room for doubt that he entirely concurred in Lord Cranworth’s judgment. “If,” he says at p. 136, “the same questions had been raised on the argument upon this appeal I should have had no difficulty in agreeing with the judgment of my noble and learned friend (Lord Cranworth)”; and at p. 145 Lord Westbury expresses the same opinion when he says—“My Lords, I would only add that I entirely concur with my noble and learned friend, the Lord Chancellor, in overruling the grounds on which the Vice-Chancellor’s judgment appears to have proceeded. . . . I agree entirely in the ground upon which my noble and learned friend rested his judgment in the court below.”

It is clear both from the written judgment of Wilson J. and also from two consecutive recitals in the formal judgment of the court, that the grounds on which he dismissed

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(1) L.R. 1 ch. 137 at 147-8 (2) L.R. 2 H.L., 127

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the plaintiff's action were the absence of a sufficient note or memorandum of the contract, and the absence of sufficient part performance by Mary Lowry. For the reasons I have given this latter ground is, in my opinion, unsustainable; and it was virtually abandoned by the defendants' counsel on the arguments in this court.

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Mr. M'Gonigal endeavoured, however, to support Wilson J.'s judgment on the ground that the acts of part performance of the contract by the plaintiff which have been relied upon are insufficient to take the case out of the statute, not being, he contends, unequivocally referable to the contract. The acts of part performance by the plaintiff which were relied upon consist mainly of the conveyance of the farm of 48 acres in Ballykeigle to Andrew Lowry followed by the giving up of possession to him; and he submits that the equity can only arise from acts of part performance relating to the lands which form the subject matter of the suit. In support of this argument he contends that the terms of the parol agreement can only be looked at after unequivocal acts of part performance have been proved; and that in the present case without the parol agreement there is no connexion between the lands of Drumhirk and those of Ballykeigle. He, therefore, concludes that acts to Ballykeigle cannot be regarded as part performance of a contract relating to Drumhirk. The argument, though plausible, is in my opinion unsustainable. The fallacy which underlies it is that, though the subject matter of the action is the farm in Drumhirk, the subject matter of the contract is the farms both in Drumhirk and Ballykeigle. I see no reason in principle, nor has any authority been cited to us to show, why a party who seeks contractual relief in regard to certain lands cannot rely as acts of part performance upon his own acts to other lands in furtherance of the same contract. Let me give two illustrations. A. agrees verbally to sell Whiteacre and Blackacre to B. for, say, £1,000. Delay arises in completing the conveyance; and B., being anxious to get immediate possession of Whiteacre for building purposes, pays the £1,000 to A., is allowed into possession of Whiteacre and proceeds to erect buildings thereon. A. subsequently refuses to convey Blackacre, and, when sued, pleads the Statute of Frauds. In my opinion B.'s acts in relation to Whiteacre constitutes a valid part performance

which takes the case out of the statute, for both lands form the subject matter of the contract, and B.'s acts to Whiteacre are, therefore, a part performance of the contract. The other illustration I put during the argument to Mr. M'Gonigal:—A., the owner of Whiteacre agrees verbally to exchange it for Blackacre, which belongs to B. If the latter executes a conveyance of Blackacre to A., how can it be contended that this is not such an act of part performance by B. as may be relied upon by him in an action to compel A. to perform his part of the contract by conveying Whiteacre to him? Unless the doctrine of part performance finds no place in the law relating to a contract for the exchange of lands, B.'s conveyance must be a sufficient act of part performance; and, in my opinion, there could be no foundation for the suggestion that the doctrine does not apply to contracts for the exchange of lands, as in my judgment the doctrine applies to all contracts of which, before the Judicature Act, a Court of Equity would have granted specific performance if the alleged contract had been in writing; and these are not confined to contracts for the sale of land. (See *Maddison v. Alderson* (1) and *M'Manus v. Cooke* (2) (approved of by Palles C.B., in *Crowley v. O'Sullivan* (3)) but include contracts for the exchange of lands. Seton 7th Edit. 1228.

I would add that I can find no authority to support Mr. M'Gonigal's contention that it is not permissible even to consider the terms of the parol agreement until it is clearly established that the acts of part performance refer unequivocally to the contract relied upon, and to that alone. Indeed, it would be, in my opinion, impossible to apply the proposition as so stated in practice; for how, I ask, could it be said that the acts of part performance referred unequivocally to an agreement the terms of which were ex hypothesi not known, unless, indeed, they were acts of such a clear, cogent, and conclusive character that they embodied and themselves proved the actual terms of the agreement, in which case it would be wholly unnecessary for the plaintiff to make any reference to or to rely in any way upon the parol agreement. In support of his contention Mr. M'Gonigal referred us to a passage in Lord

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(1) 8 A.C., 467, 474. (3) [1900] 2 I.R. 478, at 490 & 492
(2) 35 ch. D., 681, at 697.

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O'Hagan's judgment in *Maddison v. Alderson* (1), where he said :—“ Next, assuming that the action must be considered maintainable, if at all, for the purpose of enforcing a parol contract, partly performed, the course of the argument appears to me to have been further erroneous in this, that, instead of seeking to establish primarily such a performance as must necessarily imply the existence of the contract, and then proceeding to ascertain its terms, it reversed the order of the contention. The Court was asked, from the findings of the jury and the testimony supporting them, to say there was a contract; and then to discover in the conduct of the parties acts of performance sufficient to validate the bargain so previously ascertained.” If these words are to be taken literally, and to be construed as deciding that the acts of performance must in themselves necessarily imply the existence of *the* contract, that is, the precise contract pleaded, I am not prepared to accept them as containing a correct statement of the law, being, as they are, at variance with the terms of the classical judgment of the Earl of Selborne, C. in the same case, and, indeed, as it seems to me, with other passages of Lord O'Hagan's own judgment. Thus in the central paragraph on page 485, he says :—“ It (i.e., the act which shall amount to a part performance) must be sufficient of itself, and without any other information or evidence, to satisfy a court, from the circumstances it has created and the relations it has formed, that they are only consistent with the assumption of the existence of *a* contract, the terms of which equity requires, if possible, to be ascertained and enforced ” (The italics are my own).

It may be said that in the next paragraph of his judgment Lord O'Hagan again reverts to the principle that the acts must, of necessity, imply the existence of *the* agreement pleaded; but this portion of his judgment follows and is inconsistent with the passage from the judgment of Sir William Grant in *Frame v. Dawson* (2), which he cited with approval on p. 484 :—“ The principle of the cases is, that the act must be of such a nature, that if stated, it would of itself infer the existence of *some* agreement,” (again the italics are my own); “ and then parol evidence is admitted to show what the agreement is.”

I have referred to the Earl of Selborne's judgment, from which I shall only make two extracts—the first, the passage at p. 476, to which Mr. Murphy referred us in his very forcible reply:—"It is not arbitrary or unreasonable to hold that when the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from *res gestae* subsequent to and arising out of the contract. So long as the connexion of those *res gestae* with the alleged contract does not depend upon mere parol testimony, but is reasonably to be inferred from the *res gestae* themselves, justice seems to require some such limitation of the scope of the statute." The second passage is taken from page 479, where the learned Lord Chancellor summarizes the effect of the cases in the following terms:—"All the authorities show that the acts relied upon as part performance must be unequivocally and in their own nature referable to some such agreement as that alleged." These words "some such agreement" are also adopted as his own by Lord Fitzgerald in his judgment in the same case at p. 491.

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I would like to refer to one other case of recognized authority, *Morphett v. Jones* (1), where Sir T. Plumer, referring to the equitable doctrine, says that "Admission into possession, having unequivocal reference to the contract, has always been considered an act of part performance. The acknowledged possession of a stranger in the land of another is not explicable except on the supposition of an agreement, and has, therefore, constantly been received as evidence of an antecedent contract, and as sufficient to authorize an inquiry into the terms." In the opinion, therefore, of this eminent authority the sole requisite preliminary to inquiry into and proof of the terms of the parol agreement is the establishment of an act which is only explicable on the basis of the existence of some contract.

I make no apology for citing, in conclusion, as a correct summary of the law a passage from Fry on Specific Performance, 5th Edit. 292, where the editor states that the

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true principle of the operation of acts of part performance seems only to require that the acts in question be such as must be referred to some contract, and may be referred to the alleged one; that they prove the existence of some contract, and are consistent with the contract alleged. As Mr. Murphy pointed out, this paragraph gains special weight from the fact that it appeared in precisely the same form in the 2nd Edition of the book, for which the learned author was himself responsible, published in 1881. The decision in *Maddison v. Alderson* (1) necessitated no alteration in the text.

When I apply these principles to the facts of the present case, I have no difficulty in holding that such facts have been proved as take it entirely outside the statute. The transfer by William to Andrew, followed by the latter's taking over possession, must be referred to some contract, and may be referred to the alleged contract; for though it would appear from the folio that this transfer was stated to be made in consideration of the sum of two hundred and fifty pounds, it is well settled that a receipt for money, even though contained in an instrument under seal, is not conclusive that the money was in fact paid, and parol evidence may be given to prove that the whole or part of it was not paid. Mr. M'Kee's evidence as to the non-payment of the money is supported by the evidence of the other witnesses; and this part of their evidence remains, even if it be admitted, as it must be, that there is difficulty in justifying the admission of that other portion of their evidence which appears directly to contradict the transfer.

As I look at the *res gestae* and other proved circumstances of the case, and, particularly, at the contemporaneous will of Mary Lowry of 29th April, 1916, in which she left to William her farms in Drumhirk, which she had by previous wills devised to Andrew; as I bear in mind the fact that William was then about to get married, and consider the evident natural desire of the mother that the home farms at Drumhirk should remain in possession of the Lowry family; as I consider the subsequent residence of William and his wife on the farms with his mother; his work upon the farms; the handing over of the surplus

(1) 8 A.C., 467

profits to him by his mother; the disposition by the same will of 1916 of the stock, crop, and outside effects to Andrew and William in equal shares; the subsequent parol agreement of January, 1920, whereby the mother agreed with WILLIAM that in consideration of his paying Andrew £250 she would leave him the entire of the stock, crop and outside effects; as I bear in mind that that agreement, though clearly indicated in the letter of instructions for codicil of 10th January, 1920, and given effect to by that instrument, was similarly ignored by the will of 1st May, 1923, but enforced by the order of Wilson J. unappealed from in this action—as I think of all these matters, I feel I have not merely ample corroboration of the agreement deposed to in evidence by the plaintiff, his brothers, James and Hugh, and the family solicitor, Mr. M'Kee, but I have also in certain of them such evidence of part performance as enables this court, whilst acting within the principles of established authority, to do justice, and to prevent the perpetration on the plaintiff of what I, like Wilson J., would consider a great fraud. The appeal must be allowed with costs.

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BEST L.J. : I have had an opportunity of perusing the judgments of the Lord Chief Justice and Lord Justice Andrews. I agree with the conclusions arrived at, for the reasons stated.

Solicitor for the plaintiff : *John M'Kee.*

Solicitors for the defendants : *D. M'Gonigal & Sons.*
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[IN THE COURT OF APPEAL.]

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APRIL 26.IN THE MATTER OF WILLIAM RANKIN AND
JAMES SHILIDAY, Bankrupts (1).*Hire-Purchase agreement—Discounting of Bills of Exchange for monthly instalments of price—Collateral security—Property in goods—Bankruptcy of hirer.*

By an agreement in writing the owners and lessors of a Lancia omnibus agreed to let and the hirers agreed to hire the omnibus, to make an initial payment of £400 0s 0d, and to pay to the owners eighteen monthly instalments of £49 15s 3d each. The omnibus was to remain the property of the owners until the hirers exercised an option to purchase it. It was delivered to the hirers, who paid the £400 0s 0d and certain other sums to the owners in discharge of their obligations.

In pursuance of the agreement the hirers gave to the owners bills of exchange for the total amount of the monthly payments as collateral security. These bills were subsequently discounted by the owners.

The hirers were adjudicated bankrupts on 12th May, 1926, at which date there was still due to the owners the sum of £550.

The owners claimed that they were at the date of the adjudication of the bankrupts owners of the omnibus, and entitled to hold it until the balance due to them was paid.

Held by the Court of Appeal (Andrews and Best L.JJ.), reversing Moore L.C.J., that the property in the omnibus had not passed to the hirers, but remained in the owners, and that they were entitled to an order for its delivery, neither the giving of the bills as collateral security nor the subsequent discounting of them operating as conditional payment.

The following statement of facts is taken substantially from the written judgment of Andrews L.J. :—

By a certain proposal form addressed to the Curtis Automobile Company, and expressed to be “for a hire-purchase transaction,” the present bankrupts, Messrs. William Rankin and James Shilliday, sought to acquire an omnibus, value £1,207, delivery to be effected approximately on 5th December, 1920. The initial payment of £400 was to be made in cash; and the balance together with a “financing charge” of £88 14s 6d, representing interest on outstanding purchase money, made a total “balance

(1) In the Court of Appeal before Andrews and Best, L.JJ.

of hire " of £895 14s 6d, payable by eighteen monthly instalments of £49 15s 3d each. On the back of this proposal form was a document, dated 9th December, 1925, entitled "Trader's Remarks or Recommendation," which was in effect a submission of the proposal to the consideration of The United Dominions Trust, Limited, who are a firm of London bankers. This document contained a request that the Trust Company should advise the Curtis Company whether they would discount the bills or promissory notes which might be granted in connexion with the proposal. Messrs. Rankin and Shilliday were not parties to this latter document, nor was there any evidence that they were privy to it, or aware of its existence. Neither is there any evidence that any reply was received from the Trust Company other than what might be inferred from the admitted subsequent discounting of the bills. On 17th December, 1925, an agreement was entered into between the Curtis Company (called "the owner") and Messrs. Rankin and Shilliday (called "the hirer") by which the owner in clause 1 agreed to let and the hirer to hire the omnibus for the term of eighteen months (subject to determination as therein provided) for the sum of £1,295 14s 6d, payable as to £400 in cash and the balance in instalments, each such payment being expressed to be made in respect of one month's hire in advance. By clause 2 of the agreement the hirer agreed to execute and deliver to the owner a promissory note or notes or bills of exchange for the total amount of the said monthly payments payable on the due dates of the monthly payments, bearing interest after maturity until paid, such notes or bills "to be given and received not as payment of the said monthly payments due under clause 1 hereof, but as collateral security for the due payment thereof." Clause 3 contained an undertaking by the hirer to keep the omnibus in good repair and an agreement that it should remain the property of the owner unless and until the hirer exercised the option to purchase contained in clause 10 after becoming entitled so to do. Clause 4 conferred on the owner the right to take possession of the omnibus if the hirer should make default for ten days in payment of any monthly instalment or on the

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happening of any other of certain events therein specified, and further provided that thereupon the agreement should cease and determine and the rights and liabilities of the parties thereto should be at an end save as therein mentioned. Provided also that in the event of the owner retaking possession of the omnibus as aforesaid the hirer should as regards the said promissory notes or bills of exchange only be liable thereon in respect of such instalments thereof as became due before such retaking of possession with interest. Clause 9 empowered the hirer at any time to determine the agreement and the hiring by returning the omnibus to the owner without prejudice to the latter's rights in respect of any antecedent breach of the hirer's covenants; and, finally, by clause 10 it was provided that if and when the full amount firstly named and all further moneys should have been paid to the owner and provided the hirer should not have committed any antecedent breach of the provisions of the agreement, the hirer should have the option (but should not be bound) to purchase the omnibus for the sum of one shilling.

The omnibus was handed over by the Curtis Company to the hirers, who used it as a public conveyance, and who in addition to the initial £400, duly paid the first four monthly instalments of £49 15s 3d each. Immediately after the execution of the agreement the Curtis Company drew eighteen bills of exchange for the several monthly instalments payable on 17th of each month, and these were duly accepted by the hirers. On 23rd December, 1925, before any of these bills had fallen due, the Curtis Company discounted them with their bankers, the United Dominions Trust Limited, and indorsed the bills in blank. The United Dominions Trust Limited in turn specially indorsed the bills presumably for value to the Equitable Trust Company of New York; and it would appear from the bills that the latter handed them to the Midland Bank for collection, and that they were ultimately paid at the Ulster Bank.

On 12th May, 1926, the hirers, William Rankin, and James Shilliday, were adjudicated bankrupts, and at that date there was still due to the owners and lessors, the Curtis Automobile Company the sum of £550. The assignees applied to the Court for an order that the Lancia

omnibus was the property of the bankrupts at the date of their adjudication.

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MOORE L.C.J. said that assuming that this was a hire purchase agreement, his opinion in point of law was that the instalments were all paid off as soon as the Curtis Automobile Company turned the bills into cash, and from that moment the purchase was completed. Accordingly, he made an order declaring that the omnibus was the property of the bankrupts at the date of their adjudication.

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The Curtis Automobile Company Limited appealed to the Court of Appeal.

E. S. Murphy K.C., Monroe K.C. and Warnock for the appellants :—

The question is whether the property in the omnibus was in the Curtis Automobile Company or in the bankrupts. It is abundantly evident that there was no intention to transfer the property. The bills were only given as collateral security. In Chalmers' Bills of Exchange, 8th Edition, p. 353, the law is stated as follows :—"Where a bill or note is given by a debtor to his creditor it may be given either by way of payment or as collateral security, the presumption being in favour of payment. If it is given by way of collateral security, it does not suspend the creditor's right to sue for his debt."

We rely on *Continental Guarantee Corporation Ltd. v. Mercado* (1) and *Chown v. B. S. Marshall Ltd.* (2). We also rely on *Bramwell v. Eglinton* (3) a strong authority in favour of the appellants. In that case Blackburn J. said at p. 51, "Also the fact of a bill of exchange having been taken on account of the debt secured by the bill of sale would not prevent the defendant from taking possession of the goods in order to secure the lien legally vested in him. In this respect the case is extremely analogous to *Davis v. Gyde* (4) in which it was held that the receiving a promissory note on account of rent due did not extinguish the claim for such rent or suspend the right to distrain for it. So, here, the bill of exchange given on account of a specialty debt secured by the bill of sale

(1) Unreported

(3) 5 B. & S. 39.

(2) Reported in "Times Newspaper" 19th Dec. 1925 (4) 2 A & E. 623.

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does not suspend the right to take possession under the bill of sale.” In *M’Entire v. Crossley Brothers Ltd.* (1) no option was given to the hirer to terminate the agreement. See the judgment of Fitzgibbon L.J. in the same case (2), where he says at p. 25, “It is objected that the intending purchaser had no option to give the machine back. It appears to me that the absence of such an option is immaterial.” We rely on the words used by Lord Watson in the House of Lords in the same case at p. 467, and upon the speech of Lord Herschell C. in *Helby v. Matthews* (3) at p. 475, and that of Lord Macnaghten at p. 481. In the present case there is no ambiguity as to the wording or effect of the contract. We submit that the property in this bus remained in the Curtis Automobile Company.

(They also referred to *In re Athill*, *Athill v. Athill* (4), and *Ex parte Crawcour*, *In re Robertson* (5).)

M’Gonigal K.C., *Pringle K.C.*, and *Ellison* for the respondents:—

The real nature of the transaction was a sale. Any rights possessed by the Curtis Automobile Company under the hire purchase agreement were suspended until they got the bills back into their possession. The net question for decision is what is the effect of a hire purchase agreement where bills have been given as collateral security. We submit that this agreement of hire purchase is really a sham, and that the transaction was really a sale cloaked under the form of a hire purchase agreement. The two cases of *Continental Guarantee Corporation Ltd. v. Mercado* (6) and *Chown v. B. S. Marshall Ltd.* (7) do not affect the question at all. They were cited to show that this was a common form of agreement. *Bramwell v. Eglinton* (8) is, we submit, overruled by *Ex parte Schofield*, *In re Firth* (9) and *In re a Debtor*,

(1) [1895] A.C. 457.

(4) 16 Ch. D. 211.

(2) [1894] 1 I.R. 235.

(5) 9 Ch. D. 419.

(3) [1895] A.C. 471.

(6) Unreported

(7) Reported in “Times Newspaper” 19th Dec., 1925.

(8) 5 B. & S. 39.

(9) 12 Ch. D. 333

ex parte the Debtor (1). We rely on *Davis v. Gyde* (2) and submit that these cases bear out our contentions. The nature of the transaction is far more that of a sale than of a hiring. In *Davis v. Reilly* (3) it was held that where a buyer has given a bill of exchange for the price, an action will not lie, even after dishonour, if at the date of the commencement of the action the bill is outstanding in the hands of a third party. It is not sufficient to entitle the plaintiff to succeed that he is in possession of the bill at the date of the trial.

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Monroe K.C. (in reply).

ANDREWS, L.J. : This is an appeal from an Order of the Lord Chief Justice, dated 4th March, 1927, whereby it was declared, on the application of the assignees, that a certain Lancia omnibus was the property of the bankrupts at the date of their adjudication. The appellants, the Curtis Automobile Company Limited, now seek an Order that the omnibus was at the said date and still is their property, and that the assignees should forthwith deliver the omnibus to them.

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His Lordship having stated the facts and having referred to the document entitled "Trader's Remarks or Recommendation," continued :—

Messrs. Rankin and Shilliday were in no sense parties to this latter document, nor is there any evidence that they were privy to it, or even aware of its existence. Neither is there any evidence as to whether any reply was received from the Trust Company or as to the terms of any such reply other than such as might be inferred from the admitted subsequent discounting of the bills.

It is to be observed that the agreement of 17th December, 1925, in no way incorporates either the proposal form of submission on the back thereof; and it appears to me that the respective rights and liabilities of the assignees, who now represent the hirers, and of the Curtis Company, the owners and appellants, must now be deter-

(1) [1908] 1 K.B. 344

(2) 2 A. & E. 623.

(3) [1898] 1 Q.B. 1.

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mined solely by reference to this agreement.

In these circumstances the Lord Chief Justice, whilst expressly disclaiming any intention of deciding whether the agreement was or was not a hire purchase agreement, held that the instalments had all been paid off; and that as soon as the Curtis Company turned the bills into cash, the purchase was completed and they ceased to have any legal title to the omnibus. With the greatest respect to the Lord Chief Justice, I am unable to accept this view. It seems to me to overlook two important facts, first, that as provided by clause 2 of the agreement the bills were given and received not as payment of the several monthly payments but merely as collateral security for the due payment thereof; and, secondly, that the money received by the payee on discounting of bills is at most only conditional payment by his discounters, which such payee is liable to refund to them if the bills are not duly met by the acceptors on maturity. Thus in the circumstances of this case the Curtis Company are clearly liable as indorsers to the United Dominions Trust Limited for the amount of such of the bills as have not been met by the acceptors, the bankrupts; and it seems to me that it is quite impossible to say that the Curtis Company have been paid the full amount of the purchase money when portion of what they received in the form of an advance or conditional payment must be repaid to the Dominions Trust Company. Furthermore, I am clearly of opinion that money received by means of discounting the bills was never intended to be, and did not in fact amount to, payment by the hirers within the terms of the agreement; for, if it were, the hirers would have been entitled on the day the bills were discounted—23rd December, 1925—to pay the sum of one shilling and exercise their option of purchase under Clause 10. To hold otherwise than as I do would in my opinion involve many absurdities, such as that the property was transferred to the hirers without any act on their part and on a date unknown to them, and further, that such of the instalments as were duly paid by the hirers would in fact have been twice “paid” under the agreement.

I pass now to Mr. M'Gonigal's argument for the assignees. It is twofold in character. In the first place he relies upon the principle enunciated in the speech of Lord Herschell C. in *M'Entire v. Crossley Brothers* (1). He submits that in construing the agreement we must look at it as a whole to see what is its real nature and its substantial effect; and that when so viewed this agreement reveals itself as an agreement of simple purchase, as distinguished from hire purchase, under which the property in the omnibus passed to the so-called hirers, the bankrupts, notwithstanding the declaration to the contrary therein contained. He argues that it is not a hire-purchase agreement at all but a sale to be carried out by discounting bills; that the so-called hire-purchase is really a sham, the reality of the transaction being "a sale cloaked under the form of a hire-purchase agreement." I freely admit the principle relied upon by Mr. M'Gonigal of looking to the reality of the transaction, a principle which I not only fully considered but acted upon in the recent case of *Sproule v. Triumph Cycle Company* (2), where this court held that a document called an "Agreement for the Sale of Triumph Motor Cycles" was in reality an agency agreement and not an agreement for sale. My review of the authorities in that case renders it unnecessary for me to make any detailed reference to them now; but I cannot fail to direct attention to a passage in the same speech of Lord Herschell, as that relied upon by Mr. M'Gonigal, which appears to me to be singularly appropriate and helpful. He says:—"I stop there to observe that the parties have in terms expressed the intention that the property in this gas-engine should not pass until all the instalments have been paid. Upon an agreement to sell it depends upon the intention of the parties whether the property passes or does not pass. Here the parties have in terms expressed their intention, and said that the property shall not pass till the full purchase-money is paid. I know of no reason to prevent that being a perfectly lawful agreement. If that was really the intention of the parties I know of no rule or principle of law which prevents

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its being given effect to. I quite agree that if, although the parties have inserted a provision to that effect they have shown in other parts of the agreement by the language they have used or the provisions they have made, that they intended the property to pass, you must look at the transaction as a whole; and it might be necessary to hold that the property has passed although the parties have said that their intention was that it should not, because they have provided that it shall." The Lord Chancellor, however, adds that "if the matter of intention were even doubtful great weight would be given to what the parties have stated their intention to be."

A careful examination and comparison of the terms of the agreement in *M'Entire v. Crossley Brothers Ltd.* (1) with those of the agreement in the present case satisfies me that, whilst they are by no means identical, they bear such a strong resemblance to one another in their essential features that I may safely adopt the language of Lord Herschell C. in the former case in expressing the conclusion at which he had arrived and apply it as my own to the present case:—"Therefore," he said, at p. 465, "when the agreement is looked at as a whole, I can find nothing to prevent effect being given to the expressed intention of the parties that the property in this engine should not pass. I think they really intended it—I think it is perfectly natural that they should have intended it." The property in this Lancia omnibus in my clear opinion never was intended to pass to the hirers unless and until, after due payment of all the instalments, they exercised the option and paid the sum of one shilling as provided in clause 10. The property in my opinion, therefore, in the circumstances of the case, never passed to the hirers. This was, I may add, the view entertained by Messrs. Graham & Sons, solicitors for the bankrupts, when they wrote their letter of 19th May, 1926; and it was the view acquiesced in by all parties interested, including the official assignee, in the arrangements subsequently made under which the bankrupts were permitted to retain and trade with the omnibus whilst paying up certain overdue instalments.

Mr. M'Gonigal's second and alternative submission is that so long as the bills of exchange are outstanding in the hands of a third party, namely, the Equitable Trust Company, the rights of the Curtis Company to proceed under the agreement are suspended. He contends that, were the law otherwise, a manifest injustice would result; for, not only would the hirers be compelled to give up the omnibus, but they would also be liable to pay the amount due on the bills to the Equitable Trust Company as holders in due course or bona fide holders for value without notice if, indeed, they be such. The Curtis Company have, he says, deprived themselves of their legal right to recover possession of the omnibus by putting into circulation the bills which they drew; and he submits that they could only revive their right by again taking up the bills and getting them back into their own possession.

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It has long been recognised that, speaking in general terms, the acceptance of a debtor's bill or note by a creditor has the effect of suspending the creditor's remedies for recovery of his debt during the currency of the bill or note, and afterwards, notwithstanding dishonour, so long as it is outstanding in the hands of a third person to whom it has been indorsed for value by the creditor. This moratorium is based upon the principle that the bill or note operates as conditional payment (i.e., as payment if the security is paid when due), and, therefore, as an agreement, or at least as evidence of an agreement, not to sue. As Fletcher Moulton, L.J., expressed it in *In re A Debtor Ex. p. The Debtor* (1):—"It is a payment if the bill is paid, and if it is in your hands when it becomes due and is dishonoured the debt revives. But if you have availed yourself of the character of the bill as a negotiable instrument, and have passed it out of your possession so that the right to proceed on that bill is vested in someone else and not in you at the date of the dishonour, the suspension of the debt continues just as much as if the bill was not overdue."

To this general rule there are, however, it seems to me, certain well recognised exceptions. These exceptions arise in cases in which the underlying principle of conditional payment to which I have referred and upon which

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the rule is based, does not apply. One of these exceptions is where the creditor already possesses a higher remedy. Thus it was held before the Judicature Acts that the acceptance of a bill would not suspend a remedy on a demand by specialty or for rent; for in such case the legal implication of an assent that the bill shall operate as a conditional payment does not arise, since if it did the plaintiff would be deprived of a better remedy than an action on a Bill. *Davis v. Gyde* (1), *Worthington & Wigley* (2). More recent authority, however, such as *Palmer v. Bramley* (3), whilst recognising the exception, somewhat qualifies these older decisions; and it is now held that it is some evidence—a possible inference as distinguished from a necessary conclusion—to be drawn from the acceptance by a landlord of a bill for rent that he agreed that on the bill being given his remedy by distress should be suspended.

Another of such exceptions is that which in my opinion governs the present case, namely, where the bill is given as a collateral security for the debt; for, as such, it was not given or accepted as conditional payment. That this is so is, I think, made doubly clear in the present case by the express terms of clause 2 of the agreement to which I have referred. We find the existence of this exception mentioned in both text-book and authority. Thus in *Byles on Bills*, 14th Edit., 377, the learned author writes, “But a creditor may agree to take for a debt already due a bill as a collateral security without affecting his present right to sue for that debt.” In *Cavanagh on The Law of Money Securities*, 2nd Edit., 546, it is written that “if the security be purely personal then, in the absence of a positive agreement that the instrument is given out as a collateral security, the creditor as a rule has no remedy except on the security, at least in the first instance,” a statement which necessarily implies that where the instrument is given as a collateral security the creditor’s other remedies are not prejudiced. Again, in *Palmer v. Bramley* (3), A. L. Smith, L.J., referring to the bill of

(1) 2 A. & E. 623

(2) 3 Bing N.C. 454

(3) [1895] 2 Q.B. 405

exchange which had been received by the landlord for rent, at p. 407 said :—"It cannot be that in the absence of other evidence than the fact of the giving of the bill it is obligatory to hold that it was only given and taken as collateral security"—a passage which recognises in the clearest terms the difference between a bill which may be taken as conditional payment and one which is accepted merely as collateral security. In truth, it is in every case a question of intention, and it cannot reasonably be contended that a bill given and accepted expressly as collateral security should be regarded as having been given and accepted as conditional payment, especially where, as in the present case, the agreement under which the bills were given contains an express declaration of the contrary intention. Other cases in which bills were held to be given as collateral security, and not as payment, include *Drake v. Mitchell* (1), *Pring v. Clarkson* (2), and *Peacock v. Pursell* (3).

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If, then, the giving and acceptance of the bills under the agreement in the present case did not suspend other remedies conferred upon the Curtis Company by the same agreement, such as the right of taking possession of the omnibus in case of default, it seems to me that such suspension could not result from the fact that they had subsequently discounted the bills for value and, as is alleged, had not them in their possession at the date of the adjudication or when this motion was instituted. To hold otherwise would be to confer an immunity on the bankrupts which they did not previously enjoy, and which was in fact contrary to the rights provided for in the agreement by means of an act to which they were in no sense privy. It seems to me that it is one thing for immunity to arise from the nature of a bill which is such that it operates as a conditional payment, and, accordingly, is contemplated by both parties to continue whilst the bill, after maturity and dishonour, remains outstanding in the hands of a third person; it is quite another thing for such immunity, never contemplated by either party, to spring into existence contrary to the express terms of the agreement by the ex parte act of one of the parties to that agreement. Though

(1) 3 East 251

(2) 1 B. & C. 14

(3) 14 C.B. N.S. 728

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it is by no means conclusive, it is not immaterial in this connexion to point out that no such argument as that relied upon by Mr. M'Gonigal was advanced, as on the facts it might have been, in the recent unreported case to which we have been referred of *Chown v. B. S. Marshall Ltd.* (1).

I have dealt with the case on the assumption that the bills were indorsed to the Equitable Trust Company for value whilst they were still current; but, as pointed out by Mr. Monroe in his reply, there is no evidence as to this. Furthermore, there is no clear evidence that the bills were in fact outstanding in the hands of the Equitable Trust Company or other third persons at the critical dates referred to; and it would appear that many, if not all of them, must have been taken up by the Curtis Company at any rate before the hearing of the appeal, as they were produced in court from their custody. The absence of satisfactory evidence on these points might in itself be regarded as a sufficient answer to the claim of the assignees.

I have only referred to the bills in so far as their existence was alleged to affect the appellant's property in and right to possession of the omnibus. I abstain from expressing any opinion regarding the bills which might prejudice the rights or affect the liabilities of any of the several parties interested therein.

The order appealed from must be set aside with costs, and in lieu thereof it will be declared that the omnibus was at the date of adjudication and still is the property of the Curtis Company, and that the assignees do forthwith deliver it to the Curtis Company.

BEST, L.J. : This is an appeal by the Curtis Automobile Company Limited from an order of the Lord Chief Justice of the 4th March, 1927, whereby it was declared that a Lancia omnibus, Registered No. X.I.5751, was the property of the bankrupts at the date of their adjudication and which ordered that same should be sold for the benefit of the creditors of the said bankrupts; and for an order that in lieu thereof it might be declared that the said omnibus was at the said date, and still is, the property of the said company, and for delivery up thereof, and for costs.

In the month of December, 1925, the bankrupt William Rankin, on behalf of a firm, consisting of himself and the bankrupt James Shilliday, signed a printed form with blanks to be filled in described at the top thereof as a "Proposal Form for a Hire Purchase Transaction," and it was addressed to the Curtis Automobile Company Limited, and had on its back certain printed matter described at the top as "Trader's Remarks or Recommendation," with blanks to be filled in by the trader. The proposal form, when completed by Rankin and by the trader, James M'Iloy, contained the details necessary for the preparation of the agreement to be now mentioned. That agreement is dated the 17th day of December, 1925, and is made between "Curtis Automobile Company Limited (hereinafter called 'the owner') of the one part and Rankin and Shilliday (hereinafter called 'the hirer') of the other part."

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[His Lordship having referred in detail to clause 1. 2, 3, 4 and 10 proceeded:—

The schedule referred to in clause 1 of the agreement contains a description of the vehicle and sets out in tabular form particulars of the payments to be made by the hirer. On the execution of the agreement by the parties, and on the execution and delivery by Rankin and Shilliday of the bills mentioned in paragraph 2 of the agreement, and the initial payment of £400 having been made, the omnibus was delivered by the Curtis Company to Rankin and Shilliday, who thereupon used it for some time as a public omnibus, and made certain payments to the company in discharge of their obligations under the agreement until the date of their adjudication as bankrupts on 12th May, 1926. The Curtis Company had on 23rd December, 1925, indorsed the bills of exchange to the United Dominions Trust Limited and received from that Trust cash or got credit from them for the amount of such bills, subject to discount. If it be permissible to look at the back of the proposal form, it will be seen that there is a statement in the following terms:—"Please advise us you will discount the bills or promissory notes which may be granted in connexion therewith." This statement

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was addressed to the United Dominions Trust Limited by the trader, who made himself responsible for the trader's remarks or recommendation.

The claim of the Curtis Company is that the omnibus was at the date of the adjudication of the bankrupts, and still is, their property, and that they are entitled to delivery of same notwithstanding the bankruptcy.

This claim came before the Lord Chief Justice sitting in bankruptcy on the 4th day of March, 1927, and having heard the oral evidence of Mr. Edgar M. Munn, an official of the United Dominions Trust Limited, who said that he knew that the hirer had obtained a bus on the hire purchase agreement and that the agreement came into possession of the Trust, and that the bills of exchange were collateral security and were in possession of the Trust at the date of their discounting the same : and having heard counsel for the Curtis Company, and for the official assignee, the Lord Chief Justice said that it was impossible for him to deliver a considered judgment before the beginning of next term as he was just about to go out on circuit, and in view of an appeal he proposed to give what he described as a non-considered judgment at once and, he said, if the parties choose to act on it they can have the appeal ready for hearing at the earliest moment and there will be no delay involved. His Lordship further said that he would not decide the question whether this was or was not a hire purchase agreement, as he was not sure; but assuming that it was a hire purchase agreement his opinion in point of law was that the instalments were all paid off as soon as the automobile company turned the bills into cash and from that moment the purchase was completed, and an order was made declaring that the bus was the property of the bankrupts at the date of their adjudication. The official assignee was allowed costs of the application as part of his costs in the matter. This is the judgment and order appealed from.

From letters put in evidence at the hearing before the Lord Chief Justice, it appears that the traders were granted permission by the Court to continue trading pending an offer of composition after bankruptcy; that such offer was made; that it fell through, but that before it fell

through three instalments were paid to the Curtis Company by the solicitors for the bankrupts with the assent of the official assignee.

The argument addressed to us for the appellants was shortly this; that the agreement of the 17th December, 1925, was what it purports to be, namely, a hire purchase agreement; that the property in the vehicle never passed to the bankrupts; that the bills of exchange given pursuant to clause 2 of the agreement were given not by way of payment of the monthly payments due under clause 1 thereof, but in reality as collateral security for the due payment thereof as stated in clause 2.

On the question of what is collateral security, we were referred to the note in *Chalmers Bills of Sale* (1), and to *In re Athill* (2). A comparison was made of the agreement in this case with the precedent or a hire purchase agreement given in the *Encyclopædia of the Laws of England*, 2nd Edition, Vol. 6, p. 578, in clause 7 of which provision is made for the deposit with the owner of promissory notes for the amount of hire instalments to be paid, such promissory notes being given by way of collateral security.

On the question of whether the taking of notes or bills by way of collateral security in a case of this kind prevented the Curtis Company from exercising their right of resuming possession of the vehicle in the events that have happened, we were referred to the case of *Ex-parte Crawlour, in re Robertson* (3); *The Continental Guarantee Corporation Limited (now United Dominions Trust Limited) v. Mercado*, a case which is unreported, but of which a transcript of the judgment of Acton and Mackinnon J.J.'s was produced to us and certified by counsel; *Chown v. B. S. Marshall Limited* (4), and *Bramwell v. Eglinton* (5), and it was submitted that the acceptance of such collateral security by Curtis and Company did not debar them from pursuing their remedies, including the right to resume possession of the vehicle under the agreement. For the respondents the

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(1) 8th Ed. p 353

(2) 16 Ch.D. p 211

(3) 9 Ch. D. 419

(4) reported in *The Times Newspaper* of 19th December, 1925,

(5) 5 B & S. p 35

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following cases were cited:—*Ex-parte Scholefield*, *In re Firth* (1); *In re a Debtor* (2); *Baines v. Wright* (3); *Davis v. Gyde* (4); *Davis v. Reilly* (5).

Having regard to the view which I take of this case it will be unnecessary for me to consider the validity of the arguments adduced on behalf of the company as to the effect of these cases or the contentions contra put forward on the part of the assignees. Mr. M'Gonigal, for the assignees contends that despite the terms of that agreement, which purports to be a hire purchase agreement, the real transaction between the parties was a sale. Alternatively, he argued that when the bills were discounted and put into the hands of the United Dominions Trust Limited, i.e., were put into circulation, any rights which the Curtis Company had under the agreement were suspended until they got the bills back into their own hands, because if this were not so the Curtis Company could seize the bus, and concurrently with this the bills could be proved for in the bankruptcy by the holders. This latter point I decline to decide, because there is not before me sufficient information about the dealings with the bills, if any, which have taken place since their indorsement by the Company to the Trust to enable me to say what are the rights of the parties to the agreement, and of the various other persons who may have dealt with the bills. On this aspect of the case the only matter proved in evidence was that the bills were indorsed to United Dominions Trust Limited who must be taken to have known that they might not be paid at maturity.

The real point which we have to consider is, what was the nature of the transaction embodied in the agreement of 17th December, 1925? Was it what it is expressed to be, a hire purchase agreement, leaving the property in the vehicle in the Curtis Company until all the obligations into which Rankin and Shilliday had entered had been fulfilled by them and until they had exercised the option to purchase the vehicle given them by clause 10 of the agreement? Or, was the agreement a sham, as described by Mr. M'Gonigal, and was the real transaction between

(1) 12 Ch. D. 337

(4) 2 A. and E. 623

(2) [1908] 1 K.B. 344

(5) [1898] 1 Q.B. 1

(3) 16 Q.B.D. 330

the parties a sale cloaked under the form of a hire purchase agreement, and did the property in the vehicle pass to Rankin and Shilliday on the execution of the agreement, the payment of the £400 and the acceptance by them of the eighteen bills of exchange? If the contract in this case were one of sale and purchase, it does not follow that because there is such an agreement the property in the vehicle has passed to the purchasers. Upon an agreement to sell where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred, and for the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case. These are the provisions of section 17 of the Sale of Goods Act, 1893.

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The agreement as a whole—and we ought to construe it as a whole—shows, in my opinion, that it was not intended that the property in the vehicle should pass until all the terms of the agreement, including the exercise of their option to purchase, had been performed by Rankin and Shilliday. I think that the words of Lord Macnaghten applied by him to the agreement in *Helby v. Matthews* (1) are applicable to this agreement. In that case the owner of a piano agreed to let it on hire, the hirer to pay a rent by monthly instalments on the terms that the hirer might terminate the hiring by delivering up the piano to the owner, he remaining liable for all arrears of hire, also that if the hirer should punctually pay all the monthly instalments the piano should become his sole and absolute property, and that until such payment the piano should continue the sole property of the owner. Lord Macnaghten at page 481 of the Report says:—

“It seems to me that the agreement under consideration means what it says, and can mean nothing more.” Further on his Lordship says:—“The musical instrument dealer let out a piano by the month and undertook to sell it to the customer conditionally on his making a certain number of monthly payments. But it was the intention of the parties—an intention expressed on the face of the contract itself—that no one of these monthly payments

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until the very last in the series was reached, nor all of them put together without the last, should confer upon the customer any proprietary right in the piano or any interest in the nature of a lien or any interest of any sort or kind beyond the right to keep the instrument and use it for a month to come."

In this case we have the further condition that having paid all moneys due to the owner under the agreement, and provided that the hirer shall not have committed any antecedent breach of the provisions of the agreement, then the hirer is to have the option (but shall not be bound) to purchase the said motor vehicle and accessories. In face of the provisions of the agreement taken as a whole, the only conclusion to which I can come is that the property in this vehicle has not passed to the bankrupts, but is still in the Curtis Company. I wish to say a word or two about the opinion given by the Lord Chief Justice that the instalments payable by the bankrupts to the Curtis Company have all been paid off. In my opinion only those instalments which were met as they fell due by Rankin and Shilliday have been paid to the company. The proceeds arising from the discounting of a bill which is not yet mature do not necessarily constitute a payment by the acceptor of that bill to the person who receives the proceeds; the transaction is no more than a conditional payment. It may happen that the bill is not met at maturity, in which case the person who has received the proceeds may have to account either to the person who paid such proceeds to him or to the person who for the time being is the holder of the bill, and complicated questions as to the rights of the various parties concerned might have to be determined.

The hirer is in default within the meaning of clause 4 of the agreement, and the owner is entitled to retake possession of the omnibus. I think that the order appealed from should be discharged, and the appeal should be allowed with costs both here and below, and the assignees should deliver up the omnibus to the Curtis Company.

Solicitors for the appellants:—*L'Estrange & Brett.*

Solicitors for the respondents:—*William Harper & Co.*

J. M'C.

THE PORTSTEWART URBAN DISTRICT COUNCIL

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v.

HAMILL (1).

Local Government—Public building—Work executed in contravention of by-law—Failure of urban authority to signify disapproval—Completion of building—Continuing offence—Public Health (Ireland) Act, 1878, 41 and 42 Vict., c. 52, s. 42, s. 250.

The defendant H. was charged with erecting a building which in several respects contravened by-laws made pursuant to the provisions of the Public Health (Ireland) Act, 1878, by the Urban District Council of Portstewart. The defendant lodged plans with the council for approval, but commenced to build before the month limited in section 42 of the Act, had expired. No notice of disapproval was served by the council.

The defendant was prosecuted before the magistrates; the summonses did not allege a continuing offence. She was convicted and fined. On appeal the Recorder of Londonderry confirmed the conviction, but altered the penalty into one for a continuing offence.

Held, by the Divisional Court (Moore, L.C.J. and Brown J.) on a Case Stated by the Recorder of Londonderry: (1) that the offence was committed only when the entire building was completed; (2) that the contravention of the by-laws was a continuing offence, and accordingly that though the Urban Council had not signified disapproval within one month from the time when the matter of complaint arose, they were not precluded from suing for penalties; (3) that inasmuch as the defendant had only been charged with the erection of a building, penalties for a continuing offence could not be imposed.

CASE STATED by the Recorder of Londonderry for the consideration by the Divisional Court of the High Court of Justice in Northern Ireland of certain questions arising out of the alleged breach of certain by-laws of the Portstewart Urban District Council in connexion with the erection by Mrs. Sarah Hamill of a public entertainment hall within the urban district.

The case stated set out the facts as follows:—These four appeals came before me from four orders made at Petty Sessions for prosecutions by the Urban District Council of Portstewart of Mrs. Hamill for alleged offences in breaches by her of the by-laws of the Urban Council regulating the erection of new buildings in the Urban District of Portstewart.

(1) Before Moore L. C. J. and Brown J.

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The first summons which I shall call summons No. 2, alleged that Mrs. Hamill within the last past six months caused to be erected at Enfield Street, Portstewart, a public entertainment hall constructed of wood or galvanized iron without the approval of the Portstewart Urban District Council, the walls of which hall were not and are not of good bricks, stone or other hard incombustible materials properly bonded and solidly put together with mortar, in contravention of by-law No. 8 of the said Council with respect to new streets and buildings in the Urban District of Portstewart, and on the hearing the justices convicted Mrs. Hamill and ordered her to pay the continuous penalty of one shilling per day from the 23rd day of July to the 23rd day of September with an order for costs and an order for imprisonment in default of payment and it is from this order that the first appeal is taken.

The other three appeals are against orders in all respects similar except that in each of the three other cases there is a different by-law with a different building requirement involved.

In the summons which I shall call No. 4 a breach of by-law No. 12 and its requirements is complained of. In summons No. 5 a breach of No. 13 and its requirements, and in summons No. 6 a breach of by-law No. 16 are complained of.

Although the requirements of each of these by-laws and the acts complained of in each of the summons are different, yet as the same considerations rule all the four appeals I shall deal with them all together.

The by-laws of the District Council were put in evidence, and it appeared from the evidence that Mrs. Hamill, who had bought an officers' army hut on the dispersal of Government property, proceeded in the autumn of 1925 to have it conveyed to Portstewart with the intention of using its material for the erection of a hall for public entertainment. Mr. Daniel Reid was employed as her builder, and plans of the proposed hall were prepared and such plans were lodged with the District Council for approval on the 3rd November, 1925. Without hearing whether or not the District Council approved of the plans the erection of the hall was commenced some days prior to the 14th November, 1925, on which day a letter was written by the Town Surveyor to Mr. D. Reid drawing his

attention to the fact that in erecting this building without the approval of the Urban Council he was violating the Council's by-laws and asking him to cease building until he had obtained the Council's approval. I may mention here that once plans have been lodged for approval, proceeding to build before the plans have been approved of, does not seem to be a violation of any of the by-laws of the Urban Council.

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On the 19th November a letter was written by the clerk of the Urban Council both to Mrs. Hamill and to Daniel Reid stating that the plans lodged had been rejected on the grounds of the unsuitability of the site, and on the same day another letter was written to each of them calling on them as they were engaged in contravention of the Council's by-laws in erecting a building in the Urban District, to show cause why the building should not be removed, altered or pulled down.

I may mention here that it is well settled that a District Council has no power to reject plans on the grounds of the unsuitability of the proposed site, and from a letter written on the 30th November, 1925, to the District Council by Mrs. Hamill's solicitors, and the reply of the clerk of the District Council of the 3rd December, 1925, it seems "that the alleged contravention of the Council's by-laws in the letter of the 19th November, consisted of starting the building before the plans were approved of, although as already pointed out such starting of building is not a contravention of any by-law.

The erection of the hall proceeded, and there was a great deal of conflicting evidence as to the progress of the building and the time when the erection of the building was completed.

In my opinion the erection of the building was completed on the 1st April, 1926. I do not think that the mere putting up of the outside walls or even the roofing in, was a completion of the erection of the building. There was evidence that the outside structure and roofing and ceiling and most of the flooring were completed in February, 1926. Mrs. Hamill said that she thought the building was completed in the middle of March, and Mr. Daniel Reid said that he thought it was totally completed early in April. Some evidence was given on behalf of

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the District Council that carpenters were working at the building in the end of April and in May, but my finding is that the erection of the building was completed on the 1st April, 1926.

The next document is a notice dated the 22nd July, 1926, directed to Mrs. Hamill and served on her on 23rd July, 1926, giving her notice that this entertainment hall had been erected by her in contravention of the by-laws of the Urban Council, and in particular of by-laws 8, 9, 12, 13, 16, 17, 18, 90, 91, and requiring her on or before the 2nd August to show cause why the building should not be removed, altered or pulled down. This notice was replied to by a letter of the 29th July from Mrs. Hamill's solicitors, which after contending that the Council were acting in excess of their powers, warned the Council against attempting to interfere with the entertainment hall.

The four summonses were issued on 23rd September, and on the 1st October, the orders which I have already referred to and from which the appeals are taken, were made.

The questions for the opinion of the Court were :—

1. Whether the Recorder was right in holding that the matter of complaint arose only on the completion of the entire building exterior and interior on the 1st day of April, 1926, or whether the complaint did not arise on the completion of the walls and roofing more than six months prior to the commencement of the proceedings.

2. Whether the fact that the Urban Council did not signify their disapproval of the plans within one month from the lodgment thereof prevents the Council from suing for penalties.

3. Whether the respondent can in this case be convicted for a breach of more than one by-law in respect of the same building.

4. Whether the erection of the building in question is a continuing offence, so that no question can arise of the summonses in the case being brought too late.

5. Whether the Recorder was right when he was of opinion that the orders appealed from were not sustainable in so far as they imposed a daily penalty for a continuing offence, and in substituting a penalty as for an offence.

Question 3 was not argued by Counsel for the appellant, it being admitted that the answer must be "Yes."

The four by-laws involved in the appeals were :—

(8.) Every person who shall erect a new building shall cause the external and party walls thereof to be constructed of good bricks, stone or other hard and incombustible materials, properly bonded and solidly put together with mortar.

(12) Every person who shall erect a new building shall construct every wall of such building so as to rest upon proper footings or upon a sufficient tressummer.

(13.) Every person who shall erect a new public building or a new domestic building shall cause every wall of such building to have a proper damp-proof course of sheet lead, asphalte, or slates laid in cement, or of other durable material impervious to moisture, beneath the level of the lowest timbers, and at a height of not less than six inches above the surface of the ground adjoining such wall.

(16.) Every person who shall erect a new public building or a new building of the warehouse class shall construct every external wall and every party wall of such building in accordance with the following rules (therein set out); and in every case the thickness prescribed shall be the minimum thickness of which any such wall may be constructed, and the several rules shall apply only to walls built of good bricks not less than nine inches long, or of suitable stone or other blocks of hard and incombustible substance, the beds or courses being horizontal.

Murphy K.C. and *Dougherty* for the appellant *Mrs. Hamill* :—

As regard question (1) :—It is not disputed that the several by-laws have been broken, but they can only be broken once; there is no continuing offence here; *Marshall v. Smith* (1). The Recorder has found that the walls and roofs were completed more than six months before the proceedings were instituted. The 1st April was the date on which the interior was finished, but all these by-laws deal solely with exterior walls and roofing, consequently the breach took place, once and for all, in February, and the prosecution was late.

As regards question (2) :—Section 42 of the Public Health (Ireland) Act, 1878, provides that when building

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plans have been lodged for approval, the local authority shall within one month specify their approval or disapproval of such plans. Here no proper notice of disapproval was sent within a month from the date of lodgment and therefore the Urban Council must be taken as having approved of the plans and therefore cannot sue. *Masters v. Pontypool Local Government Board* (1) and *Reay v. Mayor of Gateshead* (2).

Questions (4) and (5) are covered by what has been already said.

Beattie K.C. and *Porter* for the Urban District Council of Portstewart.

Section 158 of the Public Health Act, 1875, which is precisely similar to section 42 of the Public Health (Ireland) Act, 1878, was enlarged in order to over-rule the decision in *Marshall v. Smith* (3), and Mr. Justice Hawkins so stated in *Reay v. Mayor of Gateshead* (2). So long as a building, the erection of which was an offence, continues, its continuance is an offence, if the mode of its erection is in contravention of the by-laws. It is not an offence to erect a building without submitting plans to the Council, or to begin to erect without receiving approval, but this is done at the builder's own risk, and he commits an offence if the building when erected does not conform to the by-laws. The Council need not act within one month; plans might be submitted and approved of and then altered radically: can it be suggested in such a case that the Council would have no remedy. See Lumley's Public Health at p. 239 and the judgment of Channel J. in *Welsh & Son v. West Ham Corporation* (4).

The offence is first committed when the entire building is completed. The building of a wall is not in itself an offence, but only in relation to the entire building. This is a continuing offence: *Metropolitan Board of Works v. Anthony* (5), approved of by Mr. Justice Hawkins in *Reay v. Mayor of Gateshead* (6).

No notice was necessary that the defendant would be

(1) [1878] 9 Ch. Div. 677

(2) 55 L.T.R. 92

(3) L.R. 8 C.P. I. 416.

(4) [1900] 1 Q.B. 324

(5) 47 J.P. 229

(6) 55 L.T.R. 92.

held liable for continuing penalties as for a continuing offence: *James v. Wyrill* (1) and *Airey v. Smith* (2).

Master v. Pontypool Local Government Board (3) is said to be an authority for the proposition that if plans are not disapproved of within the time limit they must be deemed to be approved of, and see *Clark v. Bloomfield* (4). In neither case is there any reference to a continuing offence. The section covers the whole case, and the month had expired before the work was commenced. The offence is complete when a building is commenced before the month elapses and is not in conformity with the by-laws. The section says that in such case the building may be pulled down and makes it a continuing offence.

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Murphy K.C. in reply.

The offence charged in the summons are all patent in the plans and there was the month for the Council to object; this was not done. There is no reference to a continuing offence in the summons except the words "are not." A continuing offence can only arise when the authority can pull down the building. This cannot be done here as no objection was made within one month from the date of the lodgment of the plans.

BROWN J. delivered the judgment of the Court.

July 8

This application by way of case stated arises out of the erection by Mrs. Sarah Hamill of a public entertainment hall constructed of wood and galvanized iron in the Urban District of Portstewart.

From the case stated by the Recorder of Londonderry it appears that Mrs. Hamill lodged the plans of the proposed hall with the Urban Council for approval on the 3rd of November, 1925.

On the 19th of November a letter was written by the Clerk of the Urban Council both to Mrs. Hamill and to Daniel Reid, the builder employed by her, stating that the plans lodged had been rejected by the Council on the grounds that the site for the proposed building was un-

(1) 48 J.P. 725.
(2) [1907] 2 K.B. 273

(3) [1878] 9 Ch. 677
(4) 1 T.L.R. 323

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suitable. It is now admitted that such a letter was not a proper notice of disapproval of the plans simply as plans. In accordance with the provisions of the Public Health (Ireland) Act, 1878, by virtue of which Urban Councils have jurisdiction in these matters, plans lodged with a council must be disapproved of, if at all, within one month from the date of such lodgment. It is admitted that no proper notice of disapproval was sent in this case.

Mrs. Hamill, however, did not wait for any decision of the Urban Council, but commenced to build before the month had expired: and there is no doubt that the building so erected by her in several respects contravenes the by-laws made by the Urban Council of Portstewart for the regulation of buildings erected within the Urban District.

Mrs. Hamill was duly summoned: a summons being issued in respect of every by-law which she had broken in the opinion of the Urban Authority. The magistrates who had heard the case duly found her guilty, and guilty of continuing offences. Mrs. Hamill appealed, and the Recorder of Londonderry held that the summonses issued did not apply to a continuing offence and altered the penalty imposed, to one for a single offence in each case.

At the request of the solicitor for Mrs. Hamill, the Recorder stated a case for the opinion of this court on four of the summonses involving breaches of four by-laws.

The first question put in the case stated is this: "Whether I was right in holding that the matter of complaint arose only on the completion of the entire building exterior and interior on the 1st day of April or whether the complaint did not arise on the completion of the walls and roofing more than six months prior to the commencement of the proceedings."

Now by section 250 of the Public Health (Ireland) Act, 1878, an urban authority must commence proceedings "within six months from the time when the matter of such complaint or information respectively arose," and the question for the court is at what precise point of time in the erection of the building the offence was committed. The court is of the opinion that the Recorder was right in holding that this offence was committed as and from the completion of the entire building, that is to say the 1st

day of April. We accordingly hold that the Recorder was right in his decision on this question.

The second question left to us is: "Whether the fact that the Urban Council did not signify their disapproval of the plans within one month from the lodgment thereof prevents the Council from suing for penalties." The first paragraph of section 42 of the Public Health (Ireland) Act, 1878, which covers this question, is as follows: "Where a notice, plan, or description of any work is required by any by-law made by a sanitary authority, to be laid before that authority, the sanitary authority shall, within one month after the same has been delivered or sent to their clerk, signify in writing their approval or disapproval of the intended work to the person proposing to execute the same; and if the work is commenced after such notice of disapproval, or before the expiration of such month without such approval, and is in any respect not in conformity with any by-law of the sanitary authority, the sanitary authority may cause so much of the work as has been executed to be pulled down or removed."

In this case it is admitted that Mrs. Hamill started to build before the month referred to in the section had expired, and it is also admitted that the building is not in conformity with the by-laws. We have been referred to many cases on that section, which I have read, but the real meaning seems to be this; that if you start to build within the month from the lodgment of plans with the authority without the approval of the authority, you do so at your own risk. You have not committed any offence if your building when erected is in perfect conformity with the by-laws; but if when so erected the building contravenes the by-laws, an offence has been committed and the building can be pulled down. By the third paragraph of the section, where an urban or sanitary authority may pull down any work, the existence of such work is deemed to constitute a continuing offence and the offender is liable to continuing penalties. We are accordingly of opinion that there is no disability precluding the council from suing for penalties and shall answer the question, "No."

As regards the third question in the Case Stated, there

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has been no argument, and it is admitted the answer must be "Yes."

The fourth question is as follows: "Whether the erection of the building in question is a continuing offence, so that no question can arise of the summonses in the case being brought too late."

It has been argued that by virtue of the decision in *Marshall v. Smith* (1) this is not a continuing offence. But it has also been pointed out that that case was decided before the Public Health Act was passed, and we have been referred to the judgment of Hawkins J. in *Reay v. The Mayor of Gateshead* (2), where he concluded that *Marshall v. Smith* was no longer law. Accordingly we answer the question "Yes."

The fifth question is "Whether I was right when I was of opinion that the orders appealed from were not sustainable in so far as they imposed a daily penalty for a continuing offence and in substituting a penalty as for an offence." In this case Mrs. Hamill got no notice from the Council that she was to be charged with a continuing offence: she was charged merely with the erection of a building. We will answer the question "Yes," and hold that the learned Recorder was right in reversing the decision of the magistrates on this point.

We are in reality affirming the Recorder completely. But let me refer again to the last words of the first paragraph of section 42 of the Public Health (Ireland) Act which I have already read: "the sanitary authority may cause so much of the work as has been executed to be pulled down or removed." That implies that a sanitary authority can step in at once without waiting for a building to be completed. And they should so step in. In our opinion the Urban Council waited too long. Each party must bear their own costs of this appeal.

Solicitors for the prosecutors: *Macauley, O'Neill & Martin.*

Solicitors for the defendant: *Crookshank Leech and Davies.*

A. A. C.

C. A.
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THOMPSON v. HORNER (1).

Water rights—Diversion of river's course—Encroachment on river's bed—Obstruction—Flooding—Riparian owners—Injuria sine damno.

The defendant H. was sued for damages for diverting the course of a river between his lands and the lands of the plaintiff T., for having so encroached on the bed of the river that the plaintiff's river banks were being injured and destroyed, and for having so impeded or interrupted the free flow of the waters of the river, that the plaintiff's lands were rendered subject to flooding and other damage.

The Recorder of Londonderry gave the plaintiff a decree for sixpence in a Civil Bill under the Title Jurisdiction. On appeal Moore L.C.J. found as a fact that there was no trespass, no obstruction, no diversion, and no damage by the defendant, but stated a case for the opinion of the Court of Appeal.

Held, by the Court of Appeal (Andrews and Best L.JJ.), that on the findings of fact contained in the Case Stated the plaintiff was not entitled to a decree for any damages.

CASE STATED by Moore L.C.J. for the opinion of His Majesty's Court of Appeal in Northern Ireland, at the County of Londonderry Spring Assizes, 1927, on an appeal from the Recorder of Londonderry as follows:—

This case came before me at the Spring Assizes, 1927, for the County of Derry on an appeal by the defendant against a decree for sixpence made by His Honour the Recorder of Derry in a civil bill under the title jurisdiction.

I refer to the original civil bill which is attached to this case and to the map made by J. J. S. Barnhill and put in evidence on behalf of the plaintiff. The plaintiff is owner in fee simple of the lands coloured green on said map, and the defendant is owner in fee simple of the lands coloured buff thereon. The river known as the Bessbrook river forms a townland boundary, and is the boundary between the lands of the plaintiff and the defendant. In or about the month of June, 1926, the defendant built, opposite to the portion of the river coloured red on the map, a solid embankment extending from his bank for a distance of from two to three feet into the river. The said embankment was built entirely upon that portion of the bed of

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the river which is owned by the defendant, and took the place of a former bank swept away at some prior date—actual date unknown. Opposite to the portion of the defendant's bank, which is not marked red on the said map, a field drain from the plaintiff's lands opens into the river, and on the opening of the drain there is a valve which prevents the water from the river entering the drain but permits the water in the drain to enter the river when the level of the water in the river is lower than that in the drain. The said embankment constructed by the defendant has narrowed the bed of the said river as shown by the cross-sections set out on the said map.

Plaintiff produced as evidence his surveyor, Mr. J. J. S. Barnhill. At the close of his evidence I asked him if he could say that there was even one pennyworth, in moneys numbered, of damage done to the plaintiff's land by reason of the said embankment. He said he could not. On re-examination he said that it would probably increase erosion in time of flood. No such increase was proved before me.

Plaintiff further alleged that the valve mentioned in paragraph 2 was retarded in its working, and that certain stakes on the bank of the river were washed away during the winter; but I found as a fact that the defendant's work was in no way contributory to this, as this state of affairs occurred at most occasional floods.

At the close of the plaintiff's case I said I was of opinion that an owner of land could do what he pleased on his own land, subject only to this, that he could not thereby injure his neighbour, and that as no damage to the smallest extent had been proved I was prepared to reverse the decree.

Pringle, K.C., asked me to state a case on this, and I agreed to do so, but Murphy, K.C., said he had his witnesses present to meet the case on the merits and asked me to give him an opportunity for them to do so. I heard the evidence accordingly, including correspondence to which I refer. I also refer to map proved by Mr. Given, surveyor, and marked, and I found as a fact that there was no trespass, no obstruction, no diversion (unless the narrowing of the stream be called a diversion) and no damage by the defendant, and said that the action was in my judgment vexatious and premature until some damage occurred.

I was about to allow the appeal and dismiss the action. Pringle, K.C., however, reminded me of my promise to state a case and claimed to be entitled (as I understood him) to at least nominal damages. This question is now stated for the court.

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If on the foregoing facts Pringle, K.C., is entitled as of right to a decree for nominal damages then the decree will be affirmed with costs as in the court below and also £6 19s 3d costs of the appeal and £7 witnesses' expenses. If, on the other hand, the law allows me a discretion, the decision in the court below will be reversed with £7 13s 9d, costs of appeal, and £2 5s 6d costs in the court below and £7 witnesses' expenses.

Pringle K.C. and *Long* for the plaintiff, Robert Thompson :—

The question to be decided is—can the plaintiff maintain an action without proving actual damage. We submit that the defendant was not entitled to do the particular acts which have been proved. We rely on *Bickett v. Morris* (1). We also rely on *M'Glone v. Smith* (2), where Palles C.B. said p. 565, "Two questions were argued before us upon this motion for judgment. The first was whether the jury were wrongly directed as to the effect of the raising of the weir by the defendant. That direction was, that if the effect of that act was to raise the water of the river, as it flowed past the plaintiff's land, above the height at which it ought of right to have flowed, such raising would be an actionable wrong, and would entitle the plaintiff to a finding in his favour, with nominal damages, even though the jury should be of opinion that he had not thereby sustained actual damage."

We submit that a finding relating to the *injuria* as distinguished from the *damnum*, is a finding on a matter of law, and is therefore subject to review. It ought to have been held that the narrowing of this stream did constitute an obstruction or diversion.

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Begley K.C. and Dougherty for the defendant, James J. Horner :—

Bicket v. Morris (1) has been whittled away to a large extent; that case was interpreted in *Orr Ewing v. Colquhoun* (2) see the speech of Lord Blackburn at pp. 852—854

We rely on *Belfast Ropeworks Co. v. Boyd* (3), and especially on the judgment of Lord Ashbourne at p. 576. We submit that no sensible injury was produced. In *Gerrard v. Crowe* (4) the appellant and respondent owned lands upon opposite sides of a river. When the river was in flood and rose higher than its bank, some of the flood water used to flow over the respondents' land, ultimately finding its way back to the river. The respondents erected an embankment from a point on their land about half a mile from the river diagonally to its bank, with the object of protecting their lands behind the embankment. The water flowing over the appellant's land in time of heavy flood was thereby increased. The appellant sued the respondents for damages, and an injunction. It was not proved that any flood channel was obstructed, or existed, or that there was any ancient or rightful course for the flood waters across the respondents' land. It was held that the action could not be maintained.

We submit that the court is bound by the findings in the Case Stated, and that on the facts as found and on the cases, there was no sensible injury done here.

Cur. Adv. Vult.

June 8

ANDREWS, L.J. : I find it utterly impossible to reconcile the maps which were put in evidence in this case, in so far as they purport to indicate the extent of the work complained of. I assume the discrepancy arises from the fact that neither surveyor knew the precise dimensions of the river before the execution of this work; and this necessarily renders its extent a matter largely of surmise to them. I, therefore, turn from the maps to the finding of fact in the Case Stated that there

(1) L.R. 1 Sc. App. 47.

(2) 2 A.C. 839

(3) 21 I.R.I. 560.

(4) [1921] 1 A.C. 395.

has been an encroachment, throughout apparently almost the entire length of the defendant's field, in the nature of a solid embankment extending from the defendant's bank for a distance of from two to three feet into the river, that is for about one-fourth or in places one-third of the river's total width. It is stated that this embankment took the place of a former bank swept away at some prior date which is unknown. Mr. Begley relies on this fact. It may give him some merits as helping to afford a natural explanation of his client's action; but we are concerned not with merits but with law; and, in the absence of any finding to the contrary, we must assume that the former condition of this river at an unknown date conferred in itself no legal right on the defendant to execute the work complained of.

The Chief Justice finds as a fact that the embankment has narrowed the bed of the river, but that no damage whatever has yet resulted from the work. He further states as follows:—"I found as a fact that there was no trespass, no obstruction, no diversion" (these are the three causes of action in the civil bill) "unless," he adds, "the narrowing of the stream be called a 'diversion'." Around these latter findings considerable argument has centred. On the one hand, it is contended for the defendant that we are absolutely bound by them as findings of fact; on the other hand, it is submitted on behalf of the plaintiff that a finding relating to the *injuria* as distinguished from the *damnum*, is a finding on a matter of law, and is, accordingly, subject to review. I cannot accept this latter argument for two reasons. *Injuria* is the infringement of a legal right, or, in other words, it is a wrongful act. Now a question as to the existence or nature of a legal right may be, doubtless is, a question of law; but the question as to whether there has been an infringement of such legal right is one of fact. Negligence is the infringement of a legal right, and, therefore, an *injuria*; so is an assault; and findings in reference to either negligence or assault are findings of fact. Likewise in the present case, whilst the private right to the free and uninterrupted flow of the water of the river is an accepted principle of law, the question as to whether this right was infringed is one of fact. But there is a further reason

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why in my opinion we are bound by these findings, namely, that this is a Case Stated, upon which I conceive it to be our duty to accept all findings set out in the case whether they be findings of fact or of law; and then, assuming their accuracy, to answer the question or questions submitted to us, and no other.

When viewed in this light all difficulty in the case seems to me to disappear. The learned Lord Chief Justice, as I have stated, finds no trespass, no obstruction, no diversion, unless the narrowing of the stream be called a diversion. I think this means that there was in his opinion no diversion, unless the narrowing of the stream, which he found clearly proved, must be held to amount to a diversion. In my opinion there is no obligation on us to arrive at any such conclusion; nor must it be held, if indeed it is open to us on the findings of the case to do so, that the narrowing of the stream amounted to an obstruction. It is not every narrowing that constitutes an obstruction or a diversion. A stone step or a plank placed at the side of the River Thames may effect a narrowing to that limited extent of the river; but it does not follow that it must be held to amount to a legal obstruction to or diversion of the river. The injury inflicted must be appreciable. The plaintiff's capability of enjoying his rights must be substantially less than it otherwise would have been. *De minimis non curat lex*. I refuse to allow myself to speculate as to whether, if I had been trying the case, I would have held, as Mr. Pringle argued that it ought to have been held, that the narrowing of this stream by one-fourth or one-third did constitute an obstruction or diversion. I accept the findings of the Lord Chief Justice at which on the evidence he was perfectly justified in arriving. These findings, as I have pointed out, amount to this—that there was neither *damnum* nor *injuria*. There can be no doubt that in these circumstances the plaintiff is not entitled to a decree for nominal damages. It is the duty of the Chief Justice on his findings to enter judgment for the defendant. If he had found, as it was open to him to have done, and as the Recorder evidently did find, that, although the acts complained of had caused no actual damage, they amounted to an obstruction or to some other legal *injuria*, the question would have arisen

which was so ably argued before us as to whether the existence of such injuria necessarily imported damage so as to entitle the plaintiff to a decree for nominal damages. I refrain from expressing any opinion on this subject which would necessarily be obiter; and content myself with answering the question submitted to us by saying that on the findings contained in the Case Stated the plaintiff is not entitled to a decree for nominal damages. The defendant must have his costs of this Case Stated which we measure at £15 15s 0d.

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BEST L.J. : In this case the defendant was sued for damages for diverting the course of a river between his lands and the lands of the plaintiff, for having so encroached on the bed of the river that the plaintiff's river banks are being injured and destroyed, and for having so impeded or interrupted the free flow of the waters of such stream or river that in consequence plaintiff's lands are rendered subject to flooding and other damage.

His Honour the learned Recorder of Londonderry gave plaintiff a decree for sixpence in a civil bill under the Title Jurisdiction, and from this decree an appeal was taken and was heard by the Lord Chief Justice at the Spring Assizes for the County of Londonderry. The Lord Chief Justice has found in reference to each cause of action as a fact that there was no trespass, no obstruction, no diversion (unless the narrowing of the stream be called a diversion) and no damage by the defendant.

In my opinion the narrowing of the stream as carried out in this case could not fairly be regarded as a diversion of the stream, and if this be so, the plaintiff has, on the findings of fact of the Lord Chief Justice, failed to prove each and every one of his causes of action. I concur in the view expressed in the judgment just delivered that these findings are findings of fact and not of law. It has also been found that he has suffered no damage.

In these circumstances I think only one answer can be given to the question put to us, and I agree that the plaintiff is not entitled to a decree for any damages.

Solicitor for the plaintiff : *R. G. Connell.*

Solicitor for the defendant : *W. J. G. Seeds.*

J. McC.

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Land Purchase Acts—Restriction on mortgaging—Irish Land Act, 1903 (3 Edw. 7, c. 37) s. 54 (3) & (4)—Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vic., c. 86) s. 40 (2)—Holding subject to land purchase annuity—Mortgage in excess of limit—Mortgage not registered until after annuity had been redeemed—Northern Ireland Land Act, 1925 (15 & 16 Geo. 5, c. 34) s. 30 (2).

The defendant was the registered owner of certain lands, the purchase annuity being £4 2s 0d. On 10th March, 1926, the plaintiff obtained a judgment against the defendant in the King's Bench Division of the High Court of Justice in Northern Ireland, and on 30th March, 1926, registered it as a judgment mortgage over the defendant's interest in the lands. He subsequently obtained an order for sale of the lands and an account in a mortgagee's suit against the defendant. The appellant was the registered owner of a prior charge for £575 against the lands. On the account being taken the plaintiff objected that the appellant's charge was invalid for any sum in excess of ten times the purchase annuity, and this objection was sustained by the County Court Judge.

On 12th May, 1924, the defendant executed in favour of the appellant a statutory mortgage affecting certain licensed premises as well as the lands the subject of the present proceedings. The appellant was made aware of the restriction contained in section 54 (3) of the Irish Land Act, 1903, as to the mortgaging or charging of lands purchased under the Land Purchase Acts, and he was advised by his solicitor that if the annuity of £4 2s 0d were redeemed before registration of the statutory mortgage in the Land Registry the restriction would no longer apply.

A cheque for the necessary amount was sent, on behalf of the appellant, to the Ministry of Finance on 16th May, 1924. The Ministry issued their receipt for the amount on 20th May, 1924, which was received by the appellant's solicitor on 21st May, 1924. On 20th May the appellant's solicitor had lodged the mortgage in the Registry of Deeds for the purpose of affecting the licensed premises. On 21st May, 1924, the appellant's solicitor lodged the mortgage in the Land Registry, and on the same day the Ministry of Finance lodged in the central office of the Land Registry the necessary document to enable the charge on the folio in respect of the annuity on the lands to be discharged, but this fact was not communicated to the local office until September, 1924. An official note was, however, sent from the central office, Land Registry, and received in the local office on 30th September, 1924, which directed the local office to rule out the charge in favour of the Irish Land Commission annuity and in margin to write "discharged this 21st

(1) In the Court of appeal before Andrews, L.J., Best L.J. and Wilson J.

day of May, 1924, No. 1209," and to rule out prohibition note and "initial"; this was accordingly done.

Held by the Court of Appeal (Andrews L.J. dissentiente) that the appellant's charge was a good and valid charge upon the lands for the full sum of £575.

Held by Andrews L.J. that the charge was void, in so far as it was in excess of ten times the amount of the annuity formerly payable out of the lands.

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CASE STATED for the opinion of His Majesty's Court of Appeal in Northern Ireland by Moore L.C.J. at the County of Tyrone Spring Assizes, 1927, as follows :—

This case came before me at the Spring Assizes, 1927, for the County of Tyrone, on an appeal by William Henry O'Doherty against an order of His Honour the County Court Judge of Tyrone confirming a certificate of the Clerk of the Crown and Peace and dated the seventh day of February, one thousand nine hundred and twenty-six. The facts which have been agreed upon by the parties are as follows :—

The plaintiff, as a judgment mortgagee, obtained an order for sale and account in a mortgagee's suit against defendant, and appellant appeared in response to the advertisement for incumbrances at the inquiry before the Clerk of the Crown and Peace for County Tyrone.

The defendant is the registered owner of lands registered under Folio No. 14384 of the Land Registry for County Tyrone, which are the lands affected by the said decree, and copy of the folio relating thereto is referred to in the schedule of documents. The appellant appears as the registered owner of a charge against the said lands for the sum of five hundred and seventy-five pounds. On behalf of the plaintiff it was objected when the accounts were being taken by the Clerk of the Crown and Peace that the appellant's said charge was invalid for any sum in excess of ten times the purchase annuity of four pounds two shillings.

It appears that the defendant on the twelfth day of May, one thousand nine hundred and twenty-four, executed a mortgage (not in the form prescribed by the Local Registration of Title Act) affecting licensed premises in Fintona as well as the lands the subject matter of these proceedings. The appellant being aware of the prohibition in section 54 (3) of the Irish Land Act, 1903, and being of opinion that if the annuity was redeemed before

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registration of his charge there would be then no restriction, agreed with the defendant that the appellant would pay off the amount due to the Land Commission out of the amount about to be advanced on the charge, and the appellant instructed his solicitor to ascertain from the Ministry of Finance the amount necessary to redeem the purchase annuity affecting these lands, and on the sixteenth day of May one thousand nine hundred and twenty-four, appellant's solicitor sent his cheque to the Ministry therefor. The Ministry issued their receipt on the twentieth day of May, one thousand nine hundred and twenty-four, for eighty-two pounds, ten shillings and eleven pence as the amount necessary for the redemption of the advance, and this was received by the appellant's solicitor on the twenty-first day of May, one thousand nine hundred and twenty-four. The appellant's solicitor on that day lodged the said mortgage in the Land Registry, it having been previously, viz.—on the twentieth day of May, one thousand nine hundred and twenty-four—registered in the Registry of Deeds to affect the licensed premises above mentioned. The Ministry of Finance lodged in the central office of the Land Registry in Belfast, on the twenty-first day of May, One thousand nine hundred and twenty-four, the necessary document to enable the charge on the folio relating to the advance to be discharged, but this was not communicated to the local office until thirtieth day of September, one thousand nine hundred and twenty-four, but the entry on the folio showing the redemption of the annuity was subsequently entered as of twenty-first May, one thousand nine hundred and twenty-four.

A clerk from the local Land Registry Office gave evidence to the effect that in respect of the lands in question the local office was the place where all dealings should originate, but he produced an official note addressed from the central office, Land Registry, and received in the local office, Omagh, on the 30th September, 1924, copy of which is as follows:—

“ Land Registry, County Tyrone, Folio 148384. R. O. Gormley. Rule out charge in favour of Irish Land Commission annuity registered on 21st January, 1920, and in margin write discharged this 21st day of May, 1924, No. 1209. Rule out prohibition note and initial.”

The said mortgage money of five hundred and seventy-five pounds was made up and advanced as follows:—A sum of one hundred and thirty-nine pounds two shillings was due by the defendant to the appellant prior to the execution of the mortgage, and on tenth May, one thousand nine hundred and twenty-four a sum of three hundred pounds was paid by the appellant at the request of the defendant for part purchase money of a public house in Fintona, which the said defendant had purchased. On twelfth May, one thousand nine hundred and twenty-four a further sum of fifty-two pounds eighteen shillings was paid by the appellant at request of defendant to one Patrick Morris for the purpose of reconveying a prior charge which he had against the defendant's said lands.

On 16th May, one thousand nine hundred and twenty-four the solicitor for the said William H. O'Doherty paid the amount of the redemption value of the outstanding Land Commission advance, thus completing the full amount of the loan in respect of which the said mortgage or charge was signed by the said defendant to the appellant.

There is set out in the schedule hereto the several documents referred to before me and which are to be taken as incorporated herein.

The question for the decision of the court is—Is the charge of the said William H. O'Doherty a good and valid charge upon the said lands for the full sum mentioned therein or is it void in so far as it is in excess of ten times the amount of the annuity payable out of the said lands.

If the appellant fails in his appeal the order of the County Court Judge is to be affirmed with costs against the appellant, but if the appellant succeeds the County Court Judge's order is to be varied and the matter sent back to the Clerk of the Crown and Peace to ascertain what amount is due to the appellant on foot of his charge without regard to the prohibition in section 54 (3) of the Irish Land Act, 1903 and appellant's costs in the court below, and of the appeal, are to be added to the amount to be found due on foot of his said charge, provided same exceeds forty-one pounds.

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Murphy K.C., Pringle K.C. and Long for William H. O'Doherty, a first chargeant against the lands :

Prior to registration the owner of the charge had no interest in the lands. It is manifest that section 54 (3) of the Irish Land Act, 1903, was intended to protect the Land Commission. The important statute is the Irish Land Act, 1909, section 32 (4). The other Acts are merely evidential. Section 40 (2) of the Local Registration of Title (Ireland) Act, 1891, provides " There shall be executed on the creation of a charge, otherwise than by will, an instrument of charge in the prescribed form, or in such other form as may appear to the registering authority to be sufficient to charge the land, but until the owner of the charge is registered as such, that instrument shall not confer on the owner of the charge any interest in the land."

In re Roulston (1) simply decided that section 54 sub-section 3 of the Irish Land Act, 1903, does not invalidate a judgment mortgage, no matter what the amount of the prior charges may be. *The National Bank v. Diffely* (2) simply decided that section 54, sub-section 3, of the Irish Land Act, 1903, is confined to instruments of mortgage or charge, and does not apply to an equitable deposit of title deeds unaccompanied by any writing.

The charge is not an effectual instrument until registered. Clearly upon the facts agreed upon and embodied in the Case Stated the crucial date is the date of registration.

It is provided by order iv, rule 31 (1) of the Land Registry Order and Rules that " When the registrar has approved of the entry to be made in respect of any dealing in the register, he shall enter the same in the register kept in the central office, and forward an official note thereof to the local registrar, who shall forthwith enter it in his register as of the day and hour on which the deed or other instrument was originally lodged." The date of registration is fixed by the date of the lodgment. The Legislature must be taken to have been aiming at the making of an effective mortgage or charge on the holding.

Section 32 (4) of the Irish Land Act, 1909, in amending section 54 of the Act of 1903 provided that "When the whole of the advance made for the purchase of a holding under the Land Purchase Acts has been repaid the conditions imposed by this section or by section 54 of the Act of 1903 shall cease to have effect as regards the holding or the proprietor thereof."

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McGonigal K.C. and *Sheil* for the plaintiff *Francis Nugent* :—

We contend that the charge is valid as to £41 only, being ten times the amount of the annuity, viz., £4 2s 0d, payable in respect of the lands to the Ministry of Finance and void as to the excess under section 54 (3) of the Irish Land Act, 1903. What really governs is the instrument of charge. It is this which is struck at by all the sections. There is no reference in the Irish Land Act, 1903, to the Local Registration of Title (Ireland) Act, 1891. It was decided in *Re M'Daniel* (1) that the consent of the Land Commission to the charging of a holding with a sum more than ten times the amount of the purchase annuity, as contemplated by section 54 (3) of the Irish Land Act, 1903, must be obtained before the charge is executed, and that a subsequent consent by the Land Commission is inoperative. We rely on *In re Roulston* (2) and the *National Bank v. Diffely* (3). The Irish Land Act, 1909, is no help to the argument on behalf of the chargeant. In the language of section 54, sub-section 3, of the Irish Land Act, 1903, it was the instrument that was aimed at.

Pringle K.C. in reply.

Cur. adv. vult

ANDREWS, L.J. : The question to be decided in this Case Stated is whether a mortgage on (amongst other lands) a holding which was being bought out under the Irish Land

(1) 54 I.L. T.R. 59

(2) [1909] 1 I.R. 306

(3) [1910] 1 I.R. 271.

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Act, 1903, and which was executed whilst the purchase annuity in respect thereof was payable, but which was not registered as regards such holding in the Land Registry until after the annuity had been redeemed, falls within the prohibition contained in section 54 (3) of the Irish Land Act, 1903, and is accordingly null and void as to the amount by which the mortgage debt exceeds ten times the amount of the purchase annuity.

The mortgage in question, which is dated 12th May, 1924, was made by the defendant Gormley to the appellant O'Doherty to secure the sum of £575. It comprised the holding referred to, out of which an annuity of £4 2s 0d was payable to the Ministry of Finance, Northern Ireland, as successors to the Irish Land Commission, and also certain licensed premises all of which are situated in the County of Tyrone. The appellant was aware of the prohibition effected by section 54 (3) of the Act of 1903, and was apparently of opinion or was advised that it would not apply if the annuity was redeemed before registration of the mortgage. Accordingly, the appellant's solicitor was instructed to ascertain the redemption price of the annuity; and, having done so, a cheque for the amount was sent to the Ministry of Finance on 16th May, 1924. The Ministry issued their receipt for same on 20th May, and this was received by the appellant's solicitor on 21st May, 1924. On 20th May the mortgage was registered in the Registry of Deeds to affect the licensed premises, and on 21st May it was registered in the Land Registry to affect the holding referred to. The official records of the local office of the Land Registry in Omagh show that the annuity was discharged and prohibition note ruled out as of 21st May, 1924.

Section 54 (3) of the Act of 1903 provides that the proprietor of the holding shall not, without the consent of the Land Commission, mortgage or charge the holding or any part thereof for any sum or sums exceeding in the aggregate ten times the amount of the purchase annuity payable in respect of the holding or part upon the making of the advance, and every instrument of mortgage or charge on a holding or part thereof by which the holding or part is charged with any larger sum shall be null and void as to the excess.

We have, accordingly, to determine whether a mortgage within the section was effected merely by the execution of the deed on 12th May, or whether a mortgage is only brought within the operation of the section when registration thereof has been duly completed. If the former be the true view, the mortgage was clearly within the prohibition, as the purchase annuity was at that date "payable in respect of the holding." If the latter view be correct, the mortgage was unaffected by the section, as on 21st May the annuity had ceased to be payable.

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Mr. Pringle, on behalf of the appellant, contended that what the Legislature must be taken to have been aiming at was the making of an effective mortgage or charge on the holding, and he referred us to section 40 (2) of the Local Registration of Title Act, 1891, the latter portion of which provides that until the owner of the charge is registered as such the instrument shall not confer on the owner of the charge any interest in the land. I cannot accept this view, which, I may say, is in conflict with the express terms of the Deed itself; for in the clause dealing with the assent to registration, reference is made to "the charge hereby created."

Not only, however, is it contrary to the terms of the deed, but it is contrary to the words of section 54 (3) and (4), as will more particularly appear in the passages which I have extracted from the judgments in reported cases of hitherto universally accepted authority, and to which I shall later refer.

Before turning, however, to authority I wish to consider the matter on principle; and in doing so it is in the first place necessary to consider the object with which the section was passed. What was the evil which was aimed at by the section? What was the mischief which the Legislature was endeavouring to prevent?

It will, I think, be within the memory of many that in more than one Continental country the laudable efforts of the State in the establishment of a beneficent system of state-aided land purchase were in a large measure defeated by the grasping methods of the money-lender, or gom-been-man, as he was popularly referred to, who advanced large sums of money to needy tenant purchasers on the security of their holdings, and thereby frequently obtained

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such a control over his victims that the holdings were sold out, and the tenant-purchasers lost the entire benefits of the system which had been designed primarily in their interests. Lord MacDonnell, who had much to do with the drafting of the Act of 1903, had experiences of this character in India. It was to prevent a similar breaking down of the system of Irish Land Purchase under the Act of 1903 that sections 54 (3) and (4) were introduced. It was what Wylie J. called in *In re Roulston* (1) a "benevolent attempt of Parliament to protect a tenant purchaser from himself." I am not concerned at the moment with whether the objections to the principle which underlay the section did or did not outweigh its virtues. It may be that the scathing criticism of Ross J. that sub-section (3) was one of the most mischievous sub-sections ever passed was fully justified. It may be, further, that the decisions that judgment mortgages and equitable mortgages by deposit did not fall within the section largely nullified its provisions and enabled them to be circumvented, so that the Legislature acted wisely in repealing the section by section 30 (2) of the Northern Ireland Land Act, 1925. I am not concerned with these matters, but only with the object of the section which clearly was, as I have stated, the grandmotherly motive of protecting the tenant-purchaser from himself. It was suggested in argument that this was not so, and that the real object of the Legislature was to protect the interests of the State by preventing anything being done by the tenant-purchaser which would prejudicially affect the security for the payment of the purchase amount; and in support of this argument Mr. Murphy referred us to the opening words of section 54, "As between the Land Commission and the proprietor for the time being of any holding"; but this argument loses all weight, indeed, it becomes a strong argument to the contrary conclusion when it is observed that the words which I have cited are not general introductory words governing all the sub-sections of section 54, but are themselves part of sub-section (1) which deals principally with sub-division of holdings, and that they are not repeated in sub-section (3). The further complete

answer, however, to the contention that sub-section (3) was passed in the interests of the State is that no section was or could be required for such a purpose, as the purchase annuity was always bound to have priority over any subsequent mortgage or charge, whether registered or unregistered.

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If then the object of the Legislature was, as I hold it to be, the protection of the tenant-purchaser, and not the protection of the State, it seems to me that Parliament must be taken to have aimed against the taking of the first step towards the completed mortgage or charge, namely, the execution of the instrument, rather than the last step, the registration; for is it not reasonable that the first rather than the last step of an illegal transaction should be prohibited.

Mr. Pringle argues that a mortgage or charge within the sub-section is not created by deed or will, but only by registration. This argument in my opinion is directly in conflict with the words to be found two lines from the end of the sub-section, " a charge created by will "; and it is also entirely opposed to the general tenor of sub-sections (3) and (4), which recognise a clear distinction between the execution or creation of an instrument of charge and its registration.

If it was the intention of the Legislature to prohibit only the completion of a mortgage or charge of excessive amount so as to confer an interest in the land on the owner of the charge this could have been simply done by the introduction of some such words into the sub-section, or by the use of the word " registered " in association with " mortgage or charge," but this was not done, and I decline to import any such unexpressed words from the Local Registration of Title Act into this sub-section.

The further and, indeed, perhaps the most weighty arguments against Mr. Pringle's contention appear in the judgments of the reported cases to which I shall now briefly refer.

In the *National Bank v. Diffely* (1) Meredith M.R. held that sub-section (3) did not apply to an equitable deposit of title deeds unaccompanied by any writing. The Master of the Rolls arrived at this conclusion because he felt that

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the section must be read as a whole without stopping at the word "advance"; that the words which immediately followed that word must be read in connexion with the preceding words; that such succeeding words referred to every instrument of mortgage or charge, words which are repeated in sub-section 4 which opens with:—"Every instrument of mortgage or charge on the holding executed," and makes such instruments null and void if not registered within three months from the date of execution. I agree with the learned Master of the Rolls when he says that in his opinion "instrument" and "executed" are the governing words which run through and interpret sub-sections (3) and (4). As there was no writing, i.e., instrument of mortgage or charge, accompanying the deposit of title deeds, the Master of the Rolls held that the proprietor had not mortgaged or charged the holding within the section. The same view as to the construction of section 54 (3) and (4) had been taken a short time previously by Wylie J. in *In re Roulston* (1), in which, holding that the section did not invalidate a judgment mortgage, he said that sub-sections (3) and (4) appeared to him only to affect an instrument of mortgage.

Further authority to a like effect is in my opinion to be found in the decision of Ross J. in the case of *Re M'Daniel* (2), where it was held that the consent of the Land Commission to the charging of a holding with a sum more than ten times the amount of the purchase annuity as contemplated by section 54 (3) of the Irish Land Act, 1903, must be obtained before the charge is executed. It is true that in that case the consent was not obtained until after both execution and registration of the deed of charge, and it cannot therefore be regarded as a conclusive authority on the point now in issue; but I can find nothing whatever in the judgment of the learned judge to lead me to think that he would have arrived at any different conclusion had the consent been obtained, before registration. On the contrary, I find a clear indication in his judgment that he regarded the date of execution as the crucial date under the section when he says that in his opinion the consent of the Land Commission must be given before the execution of the charge. If the argument for

(1) [1909] 1 I.R. 306

(2) [54] I.L. T.R. 59

the appellant in this case be correct the word "execution" should be read "registration." I am unable to assume that the word execution was not deliberately used, and I am equally unable to hold that it was not correctly used, especially as in my opinion it strictly conforms to the language of both subsections (3) and (4) of section 54.

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I see no sufficient reason for dissenting from the view expressed by the learned judges to whom I have referred; and, although, admittedly, the cases referred to are not conclusive authority in the present case, they present an unbroken chain of judicial interpretation which ought not to be ignored.

A further and independent argument addressed to us on behalf of the appellant is based on section 32 (4) of the Irish Land Act, 1909, which in amending section 54 of the Act of 1903, provides that "when the whole of the advance made for the purchase of a holding under the Land Purchase Acts has been repaid the conditions imposed by this section or by section 54 of the Act of 1903 shall cease to have effect as regards the holding or the proprietor thereof." In my opinion this sub-section has no application to the present case. It is the "conditions imposed by section 54," which it is provided shall cease to exist, whereas it is "restrictions" which are imposed by sub-section (3) upon the power of mortgaging. Of course, I freely admit, that, unless the context otherwise indicates, a "restriction" may be a "condition"; but here the context in my opinion does otherwise clearly indicate, as both sub-section (1) of section 54 of the Act of 1903 and sub-section 1 of section 32 of the Act of 1909 contain what are expressed to be "the conditions imposed," and these relate to sub-division, etc., but not to mortgaging which is dealt with in sub-sections (3) and (4). This distinction between "conditions" and "restrictions" was, I may add, clearly recognised by the Legislature when section 30 (2) of the Northern Ireland Land Act, 1925, provided that "sub-section (3) of section 54 of the Act of 1903 (which imposes restrictions on mortgaging) shall cease to have effect as respects any holding."

Mr. Pringle argued, alternatively, that even if the vital date under the section be the execution of the mortgage, such execution was not completed in the present case until

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16th May, as it was only on that day that the sum of £82 10s 11d (portion of the amount secured by the mortgage) was advanced by the appellant's solicitor, and was forwarded by the mortgagor's solicitor to the Ministry of Finance for the purpose of redeeming the annuity. Any weight which might have attached to this argument disappears when it is mentioned that the appellant's and the mortgagor's solicitors were one and the same person; and I should, perhaps, add that I can assign but little importance to this evidence which is inconsistent with the terms of the mortgage deed under which the full sum of £575 was expressed to have been paid at the time of the execution of the deed.

In my opinion the question submitted to us should be answered by saying that the charge is void in so far as it is in excess of ten times the amount of the annuity of £4 2s 0d formerly payable out of the lands.

BEST, L.J. : This is a Case Stated for the opinion of the Court by the Lord Chief Justice and arises out of an equity civil bill appeal heard at the recent Spring Assizes for the County of Tyrone.

His Lordship having stated the facts continued :—

The question for decision is whether the appellant, on the facts, has a good and valid charge on the lands in question for a sum equal to only ten times the amount of the annuity payable thereout or for the full sum of £575 secured by the statutory mortgage of 12th May, 1924.

Section 54, subsection (3), provides that the proprietor of the holding shall not, without the consent of the Land Commission, mortgage or charge the holding, or any part thereof, for any sums exceeding in the aggregate ten times the amount of the purchase annuity payable in respect of the holding or part upon the making of the advance, and every instrument of mortgage or charge on a holding or part thereof, by which the holding or part is charged with any larger sum, shall be null and void as to the excess

Sub-section (4) of the same section makes provision for the registration of any instrument of mortgage or charge, other than a charge under any Public Works Act, under the Local Registration of Title (Ireland) Act, 1891, as a

burden affecting the holding and also provides that if not registered within three months from the date of execution by the mortgagor or chargeant such instrument shall be null and void. Section 40, sub-section (2), of the latter Act provides that there shall be executed on the creation of a charge, otherwise than by will, an instrument of charge in the prescribed form or . . . but until the owner of the charge is registered as such, that instrument shall not confer on the owner of the charge any interest in the land.

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It appears, therefore, that no interest in the lands is created in favour of the owner of the charge until registration, that is to say: the mortgage or charge does not become effective *qua* the lands until registration has been carried out.

It has been suggested that the provisions of section 54, sub-section (3), were primarily intended not to protect a tenant purchaser from himself, but to preserve the interests of the Irish Land Commission in the lands out of which the annuity issued, i.e., to preserve the security for the money advanced by them and, that to ensure the fulfilment of this purpose, the proprietor of the holding was debarred from mortgaging or charging, without the consent of the Commission, his holding for any sum exceeding ten times the amount of the annuity payable thereout. I think, notwithstanding the dictum of Wylie J. to the contrary in *In re Roulston* (1) that this was the real purpose of the section.

Whether this be correct or not I hold that this condition as to charging and mortgaging or this fetter on the charging or mortgaging of the holding operates only whilst instalments of the annuities are due to the Ministry of Finance.

Once the Ministry of Finance has been paid off I think the condition or fetter is no longer applicable. If it had been intended that the ten times limit should remain applicable for ever it would have been an easy matter to insert words to this effect. The provisions of section 30, sub-section (2) of the Northern Ireland Land Act 1925 are not inconsistent with this conclusion. There is ample

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subject matter for the operation of that sub-section so long as any annuities are unpaid.

In my opinion on the true construction of section 54, sub-section (3), of the Act of 1903 read with sub-section (4) of the same section and with section 40, sub-section (2), of the Local Registration of Title Act, the mortgage or charge only becomes effective on registration.

It follows then that at the time of the registration of the mortgage in the Land Registry the limit of charging the lands to the extent only of ten times the annuity was no longer binding, and I am of opinion that the question put to us should be answered by saying that the charge of the said Wm. O'Doherty is a good and valid charge upon the said lands for the full sum mentioned therein, and is not void so far as it is in excess of ten times the amount of the annuity payable out of the said lands.

The plaintiff, Francis Nugent, must pay William H. O'Doherty the costs of the argument on the Case Stated, which we measure at twenty guineas.

WILSON J. : This is a Case Stated by the Lord Chief Justice of Northern Ireland in an equity suit brought by the plaintiff, a tail incumbrancer, for sale of lands registered under Folio No. 14384 of the County of Tyrone, for the purpose of realizing the amount due to the plaintiff by the defendant, the registered owner, on foot of a judgment mortgage registered on the 30th day of March, 1926. The plaintiff obtained the usual order for sale in default of payment and the appellant appeared on the inquiry as to incumbrances. He claimed that he was entitled to a prior charge against the said lands for £575 principal and interest duly registered against the said lands on the 21st May, 1924.

The plaintiff contended that said charge was valid as to £41 only, being ten times the amount of the annuity, viz : £4 2s 0d, payable in respect of said lands to the Ministry of Finance, and void as to the excess under section 54 (3) of Irish Land Act, 1903. It appeared that the defendant as registered owner prior to 10th May, 1924, (1) borrowed from the appellant £300 for the purchase of a public house in Fintona; (2) got appellant to advance him a sum, £52 10s 0d, to repay a prior charge on the lands, and (3)

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owed the appellant £139 2s 0d, a prior debt, and (4) got appellant to agree to pay to the Land Commission whatever sum was necessary to redeem the Land Commission annuity, afterwards ascertained to be £82 10s 11d; and in consideration of appellant doing all this the defendant agreed to give him a mortgage or charge for £575 on these registered lands and on the public house. The same solicitor acted for appellant and defendant in carrying out the transaction. On 10th May appellant paid the £300 at defendant's request for the purchase for the defendant of the public house. The parties knew of the provisions of section 54 (3) of the Irish Land Act, 1903, and were of opinion that if the purchase annuity was redeemed before the mortgage or charge to the appellant was registered that restriction or condition in section 54 (3) would no longer apply. The solicitor ascertained the amount due to the Land Commission for redemption of the annuity. The defendant on 12th May, 1924, executed an ordinary statutory mortgage to the appellant conveying as mortgagor and beneficial owner (1) these lands in fee simple subject to the payment of an annuity of £4 2s 0d to the Ministry of Finance, Northern Ireland, in Folio 14384, Registry, County of Tyrone, and (2) the newly purchased public house, subject to redemption on payment of £575 and interest at 6 per cent., and defendant assented to the registration of the charge hereby created as a burden affecting the said lands. There can be no doubt that if this mortgage or charge had been registered in the Land Register before the annuity payable to the Ministry of Finance had been paid off and extinguished it would have been a valid charge on the registered lands for £41 only. Again, if the annuity to the Ministry of Finance had been redeemed prior to the execution of this registerable charge and the charge was then registered it is admitted in argument that it would have been a good charge on the registered lands for the full amount due. If this be so, in my opinion, appellant, if this charge is held to have only given him a good charge for £41 on the lands, would have an enforceable claim in equity against the defendant to have the agreement to give him a valid charge for the full amount specifically performed and the deed of 12th May, 1924, cancelled so far as it relates to the registered land

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and another mortgage or charge granted to him and dated 21st May, 1924, and ordered to be registered as of that date and after the discharge by payment of other charge in favour of the Land Commission annuity and the prohibition note under section 54 (3) had been registered.

Further, it would seem to me that if the charge is only held valid qua charge for £41 it could well be argued that the appellant in equity is entitled to stand in the shoes of the Ministry of Finance in respect of the £82 of appellant's money paid to them to redeem the annuity and in the shoes of the prior chargeant for £52 18s 0d paid to the prior mortgagee, and that neither the owner nor his subsequent judgment mortgagees can get the advantage of these payments without paying anything for them. However, these questions have not been argued, and I merely mention them as in the equity suit the appellant has only been allowed £41 in respect of his old debt of £139 and his advance in cash of £435 8s 11d on foot of this transaction.

The vital facts of the case as argued are : the deed was executed in the form I have mentioned on 12th May, 1924. It was registered in the Registry of Deeds on 20th May, 1924, and it was lodged in the Local Registry of Title, Tyrone, on 21st May, 1924. The solicitor, having ascertained the amount required to redeem the purchase annuity on the 16th May, 1924, sent his cheque to the Ministry of Finance, who must have received it in ordinary course on 17th May, 1924, and, in my opinion, the holding ceased to be subject to the purchase annuity as from receipt of the solicitor's letter containing that cheque, provided the cheque was a good one. The Land Commission are mere chargeants. In fact it has been decided by this court that they have no equitable right, title, or interest in the lands sufficient to enable them to get a decree for possession in the King's Bench Division. On payment of the amount due their charge disappears. It would seem to me to be clear that when the deed of 12th May, 1924, was registered on 21st May, 1924, these lands were not in law or in equity subject to any annuity, but it is clear that when the Ministry of Finance lodged with the central office—got the document from the Ministry of Finance admitting the purchase annuity had been paid and discharged and this was entered on the register for Tyrone in the central office—the lands were no longer subject to the land purchase

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annuity. Parties' rights cannot be affected by the gross negligence of some official who neglects from 21st May to 30th September, 1924, to do his duty. However, plaintiff's charge is not created till March, 1926, and by that time the register was corrected. It then comes to this point: a mortgage deed is executed on 12th May, 1924, purporting to create a charge for over £500 on registered land then subject to a purchase annuity of £4 2s 0d. Between 12th May, 1924, and 21st May, 1924, the purchase annuity is redeemed and paid off and this deed of 12th May is then registered on 21st May; when the folio should have shown that the lands were no longer subject to any annuity. Does the embargo whether a condition or not created by section 54 (3) apply to the charge so then registered? The Local Registration of Title Act, 1891, had been 12 years in operation when the Act of 1903 was passed. Then lands subject to an annuity were compulsorily registerable under it, and were exempt from registration under the Acts relating to the registration of deeds (section 19). No one can acquire any estate in such registered lands under any conveyance executed on or after 5th August, 1891, until he is registered as owner of the lands, but on being so registered his title shall relate back to the date of the execution of the conveyance and any dealings with the lands before the registration shall have effect accordingly, but above provision shall not apply to any conveyance by way of mortgage or of transfer of mortgage—section 22 (1). A registered owner may charge the lands, and the owner of the charge shall be registered as such—40 (1). The instrument of charge shall be in the prescribed or in such other form as may appear to the registering authority to be sufficient to charge the lands, but until the owner of the charge is registered as such that instrument shall not confer on the owner of the charge any interest in the land—45 (2). The chargeant on registration—the contrast in these two provisions is, in my opinion, vital in this case. The mortgage or charge is waste paper so far as charging the lands, until it is registered. No dealings with the land by the nominal mortgagee are of any effect till it is registered. The registered owner alone could pay off the annuity. He did pay off the annuity on 17th May, 1924, and in fact and in

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law, when this charge of the appellants was registered on 21st May, 1924, though it purports to be a charge on lands subject to an annuity, it, in fact, was a charge created on 21st May, 1924, on lands which were freed and discharged from any purchase annuity. I would not like to form any decision on what the Legislature intended.

I then turn to the Irish Land Act, 1903. This Act made great changes in the position of so called purchasing tenants, but except so far as it did so expressly, it did not interfere with the rights of tenants who since 1870 had been buying out their holdings under the Land Purchase Acts. Section 54 (1) is copied from the Act of 1881 (sec. (3)). It is said by Andrews L.J. that section 54 (1) has no effect on the other sub-sections. Section 54 (1) makes provisions and conditions between the Land Commission and the proprietor relating to a holding for the purchase of which the Land Commission have after 14th August, 1903, made an advance, and is confined to such oldings. 54 (2), (3), (4), (5) make provisions and conditions affecting the Land Commission and the proprietor of the holding and other people. I hold that the words " the holding " in any of these sub-sections must be construed with reference to the holding mentioned in 54 (1) viz : the holding for the purchase of which money has been advanced after 15th August, 1903. Then we come to section 32 (4) of 9 Edw. VII., c. 42, where in 32 (1), (2) and (3) we have provisions restricted in various ways and then we come to 32 (4) perfectly general, viz : when the whole of the advance made for the purchase of a holding under the Land Purchase Acts has been repaid, the conditions imposed by this section or by section 54 (i.e., the whole of section 54) of the Act of 1903 shall cease to have effect as regards the holding or the proprietor thereof. The whole of the advance on this holding was repaid on 17th May, 1924. The provisions of section 54 (3) and 54 (4) of the Act of 1903 contain conditions imposed on the proprietor and other persons, and making the Land Commission the arbiter as to when these conditions are removed and, in my judgment, the whole of the conditions and restrictions in section 54 of the 1903 Act are swept away by section 32 (4) of the Act of 1909 as from 3rd December, 1909. The grandmother ceased to rule when

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the advance was repaid. I do not realize the relevance of the cases cited about judgment mortgages and equitable mortgages by deposit of deeds. The analyses of section 54 (3) and 54 (4) were helpful as shewing these sections were dealing with some deed or instrument signed by the proprietor, and therefore do not help me to the conclusion that an unregistered change or mortgage, which in law conveys no estate in these lands till it is registered, can before it is registered by an instrument of mortgage or charge on a holding or part by which the holding is charged with a sum more than ten times the amount of the annuity. I should say the provisions of Section 32 (4) are simply a return to the position a tenant purchasing always occupied since the Land Act, 1881, section 30 (1) which imposes conditions "so long as such holding is subject to any charge in respect of any annuity in favour of the Land Commission."

The plaintiff in this case is a tail incumbrancer by reason of a judgment mortgage. He has rushed this suit and compelled a sale. The plaintiff is only entitled to his costs in the same priority as his demand.

Solicitor for William H. O'Doherty : *W. E. Orr.*

Solicitors for the plaintiff : *Shields and Murnaghan.*

J. McC.

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June 7-17

MOFFATT v. SIX COUNTY MOTORS LIMITED (1).

Licence—Mechanically propelled vehicle—Regulations—Carrying more passengers than the vehicle licensed to carry—Roads Act, 1920 (10 & 11 Geo. 5, c. 72) section 11 (2).

A motor omnibus, the property of the defendants, was licensed to carry twenty passengers, but on the occasion in respect of which the complaint was made there were thirty-six passengers on board, "and they were seated on the seats in the bus, so far as the seats went, and the remaining passengers were seated on each others' knees and anywhere else they could get." There was a driver and a conductor in the bus. Subsequently the conductor was prosecuted under section 11 (1) of the Summary Jurisdiction (Ireland) Act, 1851 (14 & 15 Vict., c. 92) for "carrying passengers for hire more than the number for whom seats shall be respectively provided," and was convicted and fined. At the date of this conviction the Motor Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926 (16 & 17 Geo. 5, c. 31) was not in force, but by that statute section 11 (1) of the Summary Jurisdiction (Ireland) Act, 1851, was repealed, though a corresponding offence was created by s. 13 (1).

The complaint was brought under the Roads Act, 1920 (10 & 11 Geo. 5, c. 72), section 11 (2), which provides that "where a licence has been taken out in respect of any vehicle at the rate of duty appropriate to a hackney carriage seating not more than a certain number of persons, the person keeping the vehicle shall, if it is used on any occasion for the purpose of seating more persons than the number authorized, be liable to an excise penalty . . ."

The justices found that twenty seats, was the maximum number that the bus could seat; that there was no evidence to show that more than twenty people were accommodated with seats; that the proper licence duty had been paid for a vehicle which seated twenty passengers, and dismissed the complaint.

Held, by the King's Bench Division (Moore L.C.J. and Brown J.) that as the extra passengers were not received for the purpose of seating them, the justices were right in their determination.

CASE STATED for the opinion of the High Court of Justice in Northern Ireland, King's Bench Division, by Robert Newton, M. A. Stevenson, R. Howard, J. B. Langlands, Joseph T. Stewart, M. Fallon, and H. W. Marshall, justices, from the Dungannon Petty Sessions, held on the 13th December, 1926, as follows:—

(1) In the King's Bench Division before Moore, L.C.J. and Brown J.

At a Petty Sessions holden in and for the Petty Sessions District of Dungannon, in the County of Tyrone, on the 13th day of December, 1926, before us the Justices of the Peace acting in and for the the said County of Tyrone in the Petty Sessions District aforesaid, one Six Counties Motors, Limited, of Portadown, in the County of Armagh, defendants, were charged in and by a certain information for that they the defendants, being the owners of a mechanically propelled vehicle, to wit, a motor car, No. I.B. 3172, registered as a hackney carriage, used the said vehicle on the public road at Drumcoo, in the County of Tyrone on the 21st day of October, 1926, and the licence taken out in respect of such vehicle was at the rate appropriate to a hackney carriage seating not more than twenty passengers, yet they at the time and place aforesaid used said vehicle for the purpose of seating more persons than the number aforesaid, whereby they became liable to an Excise penalty equal to three times the difference between the duty actually paid on the licence and the duty payable on a licence for a vehicle being a hackney carriage containing the greater number of persons, and the said parties respectively being then present (the complainant being represented by Messrs. Dickie & Carson, solicitors, Omagh, and the defendants being represented by Mr. Percy Orr, solicitor, Dungannon) the charge was duly heard before us, and upon such hearing we ordered that the said complaint should be dismissed on the merits.

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And whereas the said John M. Moffat hath, pursuant to the provisions of the before mentioned statute given us notice and required us to state and sign a case setting forth the facts and grounds of our determination upon the hearing of the said information in order that he might take the opinion of the said court thereon.

Now we, the said justices, pursuant to the said notice and the provisions of the said statute, do hereby state and sign such case as aforesaid as follows :—

At the hearing of the said information it was proved on behalf of the informant and complainant that the defendants at the place and date set out in the summons used their motor bus, No. I.B. 3172, driven by A. Daly, of Market Square, Dungannon, and in charge of a conductor, with thirty-five passengers on board the bus, exclusive of

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the driver and conductor, that the bus was only licensed to carry twenty passengers, and that the thirty-five passengers who were then on board were seated on the seats in the bus so far as the seats went, and that the remaining passengers were seated on each others knees and anywhere else they could get. This proof was given by David M'Connell, constable, Royal Ulster Constabulary, No. 2324, of Dungannon, but no evidence was given by or on behalf of the complainant that there were more than twenty persons actually provided with bus seats.

It was also proved that the car in question was duly licensed for the conveyance of twenty passengers, and that licence duty in respect of this car had been duly paid at the same time the car was so used, and that the difference in the rate between that for twenty passengers and that for thirty-five passengers was eleven pounds.

The constable was cross-examined on behalf of the defendants as to the seating capacity of the car, and admitted that the car could seat on the accommodation provided no more than twenty passengers allowing sixteen inches seating capacity to each passenger, and that had the defendants attempted to licence the car for more than twenty passengers it would be necessary for them to sign a declaration as to a false seating capacity for the car, and that if such declaration were signed by them they would become liable to a penalty of fifty pounds.

The constable was further cross-examined as to a police conviction for overcrowding the vehicle in question at the same time and day and in respect of the same occasion, upon which conviction the conductor had been fined the sum of £1 and costs at a previous court.

The complainant was also cross-examined by the defendant's solicitor, and stated in cross-examination that he did not personally examine any cars presented to him for registration, but admitted that a person might have a bus capable of seating 60 passengers and that he could, if he so desired, register it for 40 passengers only and that he was satisfied that the maximum licence payable for the actual seating accommodation had been paid in respect of the defendants' bus.

The complainant's solicitor contended that the conviction for overcrowding was a purely police offence, whereas the present complaint was in respect of an Excise offence,

and quoted section 11, sub-section 2, of the Roads Act, 1920, in support of their contention.

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And whereas it was contended on behalf of the defendants that it would have been impossible for the defendants to have registered the car for more than 20 passengers seeing its seating capacity, and that the car was not used on the occasion for the purpose of seating more than 20 passengers, and for proof of this the manager of the defendant's company, Mr. Brodie, was examined by the defendants' solicitor. Mr. Brodie was cross-examined by the complainant's solicitor as to whether he considered it fair that a car which was registered for 20 passengers and whose tax was paid for the purpose of the upkeep of the road for 20 passengers, should use the road whilst carrying 35 passengers on board the car. And whereas upon the said hearing we being of opinion that the defendants should not be convicted for the offence of carrying 35 passengers on the date in question having already been convicted of an offence for overcrowding in respect of exactly the same occasion; that it was impossible for the defendant to licence the bus for more than it could seat; that they had paid the appropriate licence on a bus to seat 20 passengers, which, it was admitted, was the maximum number it could seat, allowing sixteen inches for each passenger, and that there was no evidence to show that more than 20 persons were accommodated with bus seats, gave judgment against the complainant as aforesaid, and hereupon the judgment of the court is required as to whether we the said justices were correct in point of law in our determination as aforesaid, or as to what should be done in the premises.

Murphy K.C. and Dougherty for the plaintiff :—

The net point is whether the conviction of the conductor under section 11 (1) of the Summary Jurisdiction Act, 1851, is any protection to the defendants in the present case. It is the company, not the conductor of the bus, that is being prosecuted. It is quite clear that this bus was used for the purpose of seating thirty-five passengers, and this was an infringement of section 11 (1) of the Roads Act, 1920. The entire case turns upon the construction of that section. The bus has been used for carrying

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thirty-five passengers, though only licensed for the carriage of twenty.

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We submit that this excise offence has been proved.

Pringle K.C. and *MacDermott* for the defendants :—

On the actual wording of section 11 (1) of the Roads Act, 1920, there can be no doubt that the justices were right. This section was designed to meet the case of a licence taken out for a smaller number of seats than actually provided by the vehicle. On the facts as found there is nothing to bring the case within the statute. The word used in the section is "seated" not "carrying." We submit that to constitute the offence there must be an actual increase in the seating accommodation. This bus was licensed at the maximum rate for the seating accommodation it provided. This section cannot, we submit, be aimed at overcrowding. It is a penal and revenue section, and if its meaning is open to any doubt, the subject should have the benefit.

Cur. adv. vult.

June 17

MOORE, L.C.J. delivered the judgment of the court as follows :—

This came before us on a Case Stated by the justices of Tyrone for the Petty Sessions District of Dungannon. The summons was brought by the prosecutor representing the Tyrone County Council, duly authorized to perform all the duties exercised by officers of Customs and Excise in respect of mechanically propelled vehicles used on public roads.

At the hearing it was proved that a motor omnibus No. I.B. 3172, the property of the defendants, was duly licensed to carry twenty passengers, but that on the occasion in respect of which the complaint was made there were thirty-six passengers on board "and they were seated on the seats in the bus so far as the seats went, and that the remaining passengers were seated on each others knees and anywhere else they could get." There was a driver and a conductor in the bus. Subsequently, the conductor was prosecuted under section 11, sub-section (1) of the 14th and 15th Vict., c. 92 (Summary Jurisdiction (Ireland) Act) 1851, for committing the offence therein

set out, namely, "of carrying passengers for hire more than the number for whom seats shall be respectively provided." On the hearing of this complaint he was convicted and fined one pound and costs. At the date of this conviction the Motor Vehicles (Traffic & Regulation) Act, Northern Ireland, 1926, was not in force, but by that statute section 11, sub-section (1), has since been repealed, though a corresponding offence is created by section 13, sub-section (1).

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The complaint in the present case is brought under the provisions of the Roads Act of 1920 (10 & 11 Geo. V., c. 72), section 11, sub-section 2, which reads as follows:—
"Where a licence has been taken out in respect of any vehicle at the rate of duty appropriate to a hackney carriage seating not more than a certain number of persons, the person keeping the vehicle shall, if it is used on any occasion for the purpose of seating more persons than the number authorized, be liable to an excise penalty"

The justices found that it was impossible for the defendants to obtain a licence for the bus for more than twenty seats, which was the maximum number it could seat; that there was no evidence to show that more than twenty people were accommodated with seats; that the proper licence duty had been paid for a vehicle which seated twenty passengers, and dismissed the complaint.

Some confusion has arisen between the two offences—one of overcrowding under the Summary Jurisdiction (Ireland) Act, 1851 (now under the Motor Vehicles Traffic & Regulation Act (Northern Ireland), 1926), and the other of infringing the Excise Regulations, thereby incurring Excise penalties. It is obvious that the Roads Act is really an Excise Act it is entitled "An Act to make provision for the collection and application of the Excise duties on mechanically propelled vehicles and on carriages; to amend the Finance Act, 1920, as respects such duties; and to amend the Motor Car Acts, 1896 and 1903, and the Development and Road Improvement Funds Act, 1909; and to make other provision with respect to roads and vehicles used on roads, and for purposes connected therewith." On the other hand, the Summary Jurisdiction (Ireland) Act, 1851 (14 & 15 Vict., c. 92) is described as "An Act to consolidate and amend the Acts relating to

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certain offences and other matters as to which Justices of the Peace exercise summary jurisdiction in Ireland."

The mischief against which each of the Acts named is directed is entirely distinct. The Summary Jurisdiction (Ireland) Act, 1851, plainly deals with offences against public safety in vehicles on highways. The Roads Act is an Act to protect the Revenue in cases where the duty on licences for motor vehicles may be prejudiced, avoided, or evaded. The overcrowding offence in the Summary Jurisdiction (Ireland) Act, 1851, section 11, is permitting more passengers to be carried than the number for whom seats shall respectively be provided. Section 11 of the Roads Act, on the other hand, does not deal with the offence of carrying more people, but of "using the vehicle on any occasion for the purpose of seating more persons than the number for whom seats are licensed." In my opinion, on the occasion in question, so far as an excise penalty is concerned, the defendants were obliged, if they had twenty passengers, to give each passenger a seat; whether that seat be of reasonable measurement for the accommodation of each passenger, or whether it be of 16 inches, as defined by the Summary Jurisdiction (Ireland) Act, 1851, I do not decide. But under the printed form of regulation now in use, in an application for a licence which has been exhibited to us in the course of the argument, "seating capacity" as defined in the vehicle licence is expressed, F, sub-clause 2, to be "Seating capacity to be available on the basis of 16 inches per seat." In the present case, if the defendants admitted thirty-five persons to a seating capacity of only twenty seats, as the justices have found, they have either left fifteen persons unseated, or by decreasing the amount of seating capacity, have left the whole thirty-five unseated in the sense that not one of them possibly could have had such a seat, as in law he or she was entitled to. This is to some extent a fraud on the passengers, but it is such a fraud, almost under compulsion, as persons in the position of the defendants, or even of corporation owners of tramcars, have occasionally to submit to if, on special occasions or on a wet day, the public insist on crowding in. But I do not think it can be said that the extra passengers were received on the defendants' omnibus for the purpose of being

seated. Section 11 is really intended to provide an excise penalty for the case where an omnibus capable of seating, say, 30 or 40, is licensed only to seat 20, and where having obtained the licence the owner proceeds without any further licence to provide seating accommodation for a larger number. That obviously was not done in this case. The defendants were liable to conviction on the charge of overcrowding, but, in my judgment, as the extra passengers were not received for the purpose of seating more than the 20 persons licensed, the justices were right in their determination, and the question submitted to us should be answered accordingly.

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Solicitors for plaintiff : *Dickie & Carson.*

Solicitor for defendant : *Percy Orr.*

J. M'C.

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June 7

CAMPBELL v. STRACHAN (1)

*Mechanically propelled vehicles—Speed dangerous to the public—
Licence — Indorsement — Discretion of Justices — Motor
Vehicles (Traffic and Regulation) Act, 1926 (16 & 17 Geo. 5,
N.I., c. 31).*

The defendant was prosecuted for driving a motor car at a speed which was dangerous to the public, contrary to the provisions of section 1 (1) of the Motor Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926 (16 & 17 Geo. 5, c. 31).

The justices convicted the defendant. They were asked not to endorse the particulars of the conviction on his licence, but as they were of opinion that the third paragraph of the proviso to section 4 (1) gave them no discretion, they ordered the particulars to be endorsed on the defendant's licence.

Held by the King's Bench Division (Moore L.C.J. and Brown J.) that it was not imperative on the justices in the case of a first conviction under section 1 (1) of the Motor Vehicles (Traffic and Regulation Act) (Northern Ireland), 1926, to endorse the licence.

CASE STATED at the instance of the defendant for the opinion of the High Court of Justice in Northern Ireland, King's Bench Division, by the justices sitting at the Belfast Petty Sessions, held on the 16th March, 1927, as follows :—

At a petty sessions holden in and for the Petty Sessions District of Belfast on the 16th day of March, 1927, before us, the justices of the peace, acting in and for the Petty Sessions District of Belfast in the County of the City of Belfast, Head Constable James Campbell, the above named complainant (whose name was inserted as complainant instead of that of District Inspector Francis W. Lewis, who was not available owing to his transfer to another district) charged George Cathcart Strachan, the above named defendant in and by a certain summons, for that he, on the twenty-fourth day of February, 1927, on a public highway in the City of Belfast, did drive a motor car at a speed which was dangerous to the public having regard to all the circumstances of the case, contrary to the statute, and the said parties respectively being then present the charge was duly heard before us and upon such hearing

(1) In the Kings' Bench Division before Moore, L.C.J., and Brown, J.

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defendant was thereby convicted of the said offence and ordered to pay for fine the sum of twenty shillings and for costs the sum of two shillings in seven clear days, and in default of payment to be imprisoned in the goal at Belfast for the period of fourteen days without hard labour, unless the said sums be sooner paid. One shilling to be added to the costs if warrant issue. This conviction to be indorsed on defendant's licence to drive a motor car. And whereas the said George Cathcart Strachan hath, pursuant to the provisions of the before mentioned statute, given us notice and required us to state and sign a case setting forth the facts and grounds of our determination upon the hearing of the said complaint in order that he might take the opinion of the said court thereon. Now we, the said justices, pursuant to the said notice and the provisions of the said statute, do hereby state and sign the following case.

The facts as proved were as follows :—The defendant, on the 24th day of February, 1927, drove a motor car on a public highway, to wit, on University Road, in the City of Belfast, at a speed which was dangerous to the public having regard to all the circumstances of the case, as his speed was too fast and involved danger to the public having regard to the fact that there were many persons on the highway at the time, and also having regard to the fact that one third of the highway was undergoing repairs, and was therefore, not available for traffic. We, therefore, by a majority of us, the justices then present, convicted the defendant of the offence charged in the said summons under section 1 (1) of the Motor Vehicles (Traffic and Regulation) Act (Northern Ireland) (1926). He had not been previously convicted of any offence. We fined him twenty shillings. We were asked on behalf of the defendant not to indorse the particulars of the conviction on his licence to drive a motor car, and it was contended on his behalf that it was within our discretion to indorse or not to indorse these particulars on the licence. We were of opinion and decided that the third paragraph of the proviso to the first sub-section of section four of the said Motor Vehicles Act gave us no discretion, and was imperative that the particulars of the said conviction should be indorsed on the licence, and we, therefore,

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ordered these particulars to be indorsed on the defendant's licence. The question upon which the opinion of the court is sought is whether we were right in law in holding that the said Motor Vehicles Act gave us no discretion as to indorsing the particulars of the said conviction on the defendant's licence and was imperative on us to indorse them, and, if not, what should be done in the premises.

S. C. Porter for the defendant :—Under section 4 of the Motor Vehicles (Traffic and Regulation) Act, 1926, the magistrates are given a complete discretion. The power of indorsement is limited by sub-clause (iii) of section 4. The words used are “offences hereinbefore mentioned in the proviso.” I submit that the proviso only applies to the case of a second or subsequent conviction under section 1 (1) of the Motor Vehicles (Traffic and Regulation) Act, 1926.

I rely on *Rex v. Dibdin* (1), and especially on the judgment of Fletcher Moulton L.J. at p. 125 where he says, “The fallacy of the proposed method of interpretation is not far to seek. It sins against the fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso. It treats it as if it were an independent enacting clause instead of being dependent on the main enactment.”

Babington K.C. (Attorney-General) and *Dougherty* for the plaintiff :—The magistrates were obliged to indorse by the words of the section. The proviso applies to all convictions. The governing words are “an offence hereinbefore mentioned in this proviso.” What is dealt with is “an offence,” and not a conviction. The rule laid down in *Heydon's Case* (2) should be applied here, “When an Act is open to two constructions, that construction ought to be adopted which is the more reasonable, and the better calculated to give effect to the expressed intention. *Llewellyn v. Vale of Glamorgan Railway* (3). We submit that the true construction is that “an offence” refers to an offence under section 1 (1) of the Motor Vehicles (Traffic and Regulation Act (Northern Ireland), 1926.

(1) [1910] P. 57

(2) 3 Co. Rep. 7 a.

(3) [1898] 1 Q.B. 478

The court should give such effect to the statute as will fulfil the obvious intention of the legislature.

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MOORE L.C.J. : Our decision in this case is of some importance, as I understand there have been similar cases heard at various courts of petty sessions throughout Northern Ireland at which the justices have taken different views on the question before us. The facts are that the defendant (Strachan) on 24th February, 1927, drove a motor car at a speed which was dangerous to the public, and thereby committed an offence under section 1, sub-clause (1) of the Motor Vehicles (Traffic and Regulation) Act, Northern Ireland, 1926. The magistrates at Belfast Petty Sessions convicted him, and were of the opinion that it was imperative upon them, under the provisions of section 4 of the Act to indorse his licence. As they took this view it did not become necessary for them to decide whether or not, if they had a discretion, the licence should be indorsed, and on this point the Case Stated is silent; but the Attorney General has asked us to treat it on the basis that unless it was imperative upon the justices to do so, they would not have indorsed the licence.

The whole question of indorsement arises under section 4, to which I have already referred. Under the provisos (a), (b) and c) of that section the justices have an uncontrolled discretion to suspend a licence, to disqualify an applicant for a licence, and to order indorsement of a licence on conviction of any of the offences enumerated in section 4, sub-clause (1). But this power is to some extent limited by the provisos following the section's sub-clause (c), and so far as indorsement is concerned it is governed by sub-clause 3, which reads as follows:—"In the case of a conviction for an offence hereinbefore mentioned in this proviso, the court shall cause particulars of the conviction and of any resulting disqualification to be indorsed upon the licence under this part of this Act, if any held by the person convicted."

This section, sub-clause 3, is therefore mandatory "in respect of a conviction for an offence hereinbefore mentioned in this proviso." It will be noted that the words used are not "offences under this Act," nor "offences under section 4, sub-clause (1)," but "offences hereinbefore mentioned in the proviso." We must therefore

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look at the proviso to discover what offences these are. We are now dealing with an offence under section 1, sub-section (1), in respect of which the defendant in the present case has been convicted, and which is the first offence mentioned in the proviso; but the proviso only applies to the case of a second or subsequent conviction under section 1, sub-section (1). In my opinion the expression "a second conviction for an offence under section 1, sub-section (1)" is equivalent to a "conviction for a second offence under section 1, sub-section (1)," and therefore the proviso, so far as section 1 (1) is concerned, only covers the case of a second offence. This leaves unimpaired the absolute discretion of the court if they think fit, in the case of a first offence, to indorse the licence under sub-section (c).

In my opinion, as this is a test case, the prosecutor should pay the costs of the appellant in this Case Stated.

We answer the question put to us by stating that it is not imperative on the justices in the case of a first conviction under section 1 (1) to indorse the licence.

BROWN J. : I concur,

Solicitor for the plaintiff: *Assistant Chief Crown Solicitor.*

Solicitors for the defendant: *S. Ross & Co.*

J. McC.

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AGENCY—IMPLIED WARRANTY—Sale of Goods Act, 1893 (56 and 57 Vict., c. 71) s. 14—Express Guarantee—Express exclusion of Warranty. The plaintiff entered into negotiations with one C. for the purchase of a motor bicycle manufactured by the defendant company. At the first interview C. gave to the plaintiff a booklet issued by the defendant company called "Hints," containing certain working directions necessary for the smooth running of the particular machine, and alleged that he had at the same time handed to the plaintiff a catalogue of the defendants which contained an express guarantee which excluded "the guarantee implied by statute or otherwise as to the quality or fitness of such machines for the purpose of motor cycling." C. was described as motor agent and acted as agent of the defendant company, but at the foot of the guarantee in their catalogue it was stated that "the term agent is used in a complimentary sense only and those firms whom we style our agents are not authorised to advertise, incur any debts or transact any business on our account, other than the sale of goods which they

may purchase from us; nor are they authorised to give any warranty or make any representation on our behalf other than those contained in the above guarantee." The plaintiff subsequently purchased through C. a motor cycle of the defendants' manufacture, and the form of guarantee furnished with the machine stated that "we guarantee only those machines which are bought either direct from us or from one of our duly authorised agents, and under no other conditions." The machine proved defective, and the defendant in an accident thereby caused suffered serious injury to his leg. The plaintiff sued the company for damages, relying upon (a) the implied condition under the Sale of Goods Act, 1893, section 14; (b) the purchase of the machine from the defendant company through their agent C. The defendants alleged that the cycle had been sold by them to C., who resold it to the plaintiff. At the trial the jury, accepting the evidence of the plaintiff that he had not got the catalogue, found that in the sale of the motor cycle C. was agent for the defendants and awarded the plaintiff £1,200 damages. On motion for a new trial it was held by Moore L.C.J., Andrews and Best L.J.J. that there was a sale by the defendant company to the plaintiff through their agent C. without any limitation of liability, that the implied warranty under section 14 of the Sale of Goods Act, 1893, came into force, and the defendant's warranty never applied. *Sproule v Triumph Cycle Co., Ltd.*

[App. 83

FRAUDS, STATUTE OF—PAROL CONTRACT RELATING TO LAND—Part performance by party seeking to enforce contract. A mother undertook verbally to make a will leaving to her son W.L. her two farms of land in D. and thereby induced W.L., the plaintiff, to convey his farm in B. to his brother A.L., and to pay A.L. the sum of £200. She afterwards made a will which gave effect to this verbal undertaking, but subsequently revoked it, leaving W.L. merely a life interest in the two farms. Held, by the Court of Appeal (Moore L.C.J., Andrews and Best L.J.J.) reversing Wilson J., that W.L., having given up his own property to his detriment on the faith of his mother's representations, was en-

titled to a decree for specific performance to carry these representations into execution, and that acts of part performance by W.L. were sufficient to take the case out of the operation of the Statute of Frauds (7 Will. 3, Ir. c. 12) s. 2. *Lowry v. Reid*.

[APP. 142]

HIRE-PURCHASE AGREEMENT—DISCOUNTING OF BILLS OF EXCHANGE FOR INSTALMENTS OF PRICE—Collateral security—Property in goods—Bankruptcy of hirer. By an agreement in writing the owners and lessors of a Lancia omnibus agreed to let and the hirers agreed to hire the omnibus, to make an initial payment of £400 0s 0d, and to pay to the owners eighteen monthly instalments of £49 15s 3d each. The omnibus was to remain the property of the owners until the hirers exercised an option to purchase it. It was delivered to the hirers, who paid the £400 0s 0d and certain other sums to the owners in discharge of their obligations. In pursuance of the agreement the hirers gave to the owners bills of exchange for the total amount of the monthly payments as collateral security. These bills were subsequently discounted by the owners. The hirers were adjudicated bankrupts on 12th May, 1926, at which date there was still due to the owners the sum of £550. The owners claimed that they were at the date of the adjudication of the bankrupts owners of the omnibus, and entitled to hold it until the balance due to them was paid. *Held* by the Court of Appeal (Andrews and Best L.J.J.), reversing Moore L.C.J., that the property in the omnibus had not passed to the hirers, but remained in the owners, and that they were entitled to an order for its delivery, neither the giving of the bills as collateral security nor the subsequent discounting of them operating as conditional payment. *In re Rankin and Skiliday*.

[APP. 162]

LAND ACT (N.I.) 1925—PROCEDURE—No appeal from allowance of—Objection to Provisional List—Northern Ireland Land Act, 1925 (15 and 16 Geo. 5, c. 54), section 17 (1) (2) (3), section 33, section 36 (1)—Purchase of Land (Ireland) Act, 1885 (48 and 49 Vict., c. 73) section 22—Land Law (Ireland) Act 1881 (44 and 45 Vict., c. 49), Section 48—Irish Land Act, 1903 (3 Ed. vii., c. 37), section 24 (12)

(13), section 15. J. M'C. was the tenant from before 1861 of a holding consisting of two detached fields. The proceedings related to only one of these fields, which from about the year 1893 had been held under a seasonal letting in conacre by D.G., who continued to occupy the field until 1921. No receipts for rent were given to him. J. M'C. died in December, 1905, having by his will bequeathed his property of every kind to his nephew R. M'C. In 1921 D.G. informed R. M'C. that he did not wish to keep the field any longer whereupon R. M'C. let the field to S. H. for grazing. The field was included in a provisional list of lands to be vested under the Northern Ireland Land Act, 1925, on an appointed day. S. H. lodged an objection to the list and the Land Commission allowed the objection, and directed that for the purposes of a new provisional list S. H. should be treated as tenant of the field. *Held*, by the Court of Appeal Andrews and Best L.(J.J.) that no jurisdiction to hear the appeal was conferred on the Court by the Northern Ireland Act, 1925, and further that as the finding of the Land Purchase Commission was one of fact no jurisdiction existed under the earlier Acts of the Land Purchase code. *Rowan Hamilton's Estate*.

[APP. 132]

LAND PURCHASE ACTS—RESTRICTION ON MORTGAGING—Irish Land Act, 1903 (3Edw. 7, c. 37), s. 54 (3) & (4)—Local Registration Ireland, 1891 (54 & 55 Vic., c. 66), s. 40 (2)—Holding subject to land purchase annuity—Mortgage in excess of limit—Mortgage not registered until after annuity had been redeemed—Northern Ireland Land Act, 1925 (15 & 16 Geo. 5, c. 34) s. 30 (2). The defendant was the registered owner of certain lands, the purchase annuity registered on 21st January, 1920, being £4 2s 0d. On 10th March, 1926, the plaintiff obtained a judgment against the defendant in the King's Bench Division of the High Court of Justice in Northern Ireland, and on 30th March, 1926, registered it as a judgment mortgage over the defendant's interest in the lands. He subsequently obtained an order for sale of the lands and an account in a mortgagee's suit against the defendant. The appellant was the registered owner of a prior charge for £575 against the lands. On the account being taken the plaintiff objected that the appel-

lant's charge was invalid for any sum in excess of ten times the purchase annuity, and this objection was sustained by the County Court Judge. On 12th May, 1924, the defendant executed in favour of the appellant a statutory mortgage affecting certain licensed premises as well as the lands the subject of the present proceedings. The appellant was made aware of the restriction contained in section 54 (3) of the Irish Land Act, 1903, as to the mortgaging or charging of lands purchased under the Land Purchase Acts, and he was advised by his solicitor that if the annuity of £4 2s 0d were redeemed before registration of the statutory mortgage in the Land Registry the restriction would no longer apply. A cheque for the necessary amount was sent on behalf of the appellant to the Ministry of Finance on 16th May, 1924. The Ministry issued their receipt for the amount on 20th May, 1924, which was received by the appellant's solicitor on 21st May, 1924. On 20th May the appellant's solicitor had lodged the mortgage in the Registry of Deeds for the purpose of affecting the licensed premises. On 21st May, 1924, the appellant's solicitor lodged the mortgage in the Land Registry, and on the same day the Ministry of Finance lodged in the central office of the Land Registry the necessary document to enable the charge on the folio in respect of the annuity on the lands to be discharged, but this fact was not communicated to the local office until September, 1924. An official note was, however, sent from the central office, Land Registry, and received in the local office on 30th September, 1924, which directed the local office to rule out charge in favour of the Irish Land Commission annuity and in margin to write "discharged this 21st day of May, 1924, No. 1209," and to rule out prohibition note and initial"; this was accordingly done. *Held* by the Court of Appeal (Andrews L.J. dissentiente) that the appellant's charge was a good and valid charge upon the lands for the full sum of £575. *Held* by Andrews L.J. that the charge was void, in so far as it was in excess of ten times the amount of the annuity formerly payable out of the lands. *Nugent v. Gormley O'Doherty, Appellant.* [App. 198

of Property Act, 1881 (44 & 45 Vict., c. 41), s. 14 (1)—Bule against Perpetuities—Repugnancy. By an indenture of Fee Farm Grant dated 14th July, 1880, certain lands were conveyed by the trustees of the S. Estate to trustees nominated by and on behalf of the Presbyterian Congregation of S. in connexion with the General Assembly of the Presbyterian Church in Ireland. The grant contained covenants for the building of a manse on the land granted, the manse to be for the Presbyterian congregation of S., and numerous provisions regulating the use of the building as a manse only, and only for the benefit of the S. congregation, while it continued to exist as such. It was further provided that if the congregation should cease to be in connexion with the General Assembly, or should become united with any other congregation or cease to exist as a separate and independent congregation the grant should become absolutely null and void, and a power of re-entry was reserved to the grantor. The plaintiffs served upon the defendants a notice demanding possession of the premises within ten days on the ground that the grant had become null and void by reason of the union for the congregations of C. and S. The trial judge found as a fact that the Committee on Union of the General Assembly had power to effect a union between the congregations of C. and S., and that this had been carried out in accordance with the terms of their report. On case stated by Moore L.C.J. in proceedings by way of Civil Bill for recovery of possession of the premises:—*Held*, by the Court of Appeal (Andrews and Best L.JJ.) that a sufficient notice under s. 14 (1) of the Conveyancing and Law of Property Act, 1881, was a condition precedent to enforcing the forfeiture, and that the notice given was not sufficient, and therefore the proceedings were not maintainable. *Held* also that the union of the congregations of C. and S., or the congregation of S. having ceased to be separate and independent, constituted the "event" contemplated by the forfeiture condition in the deed. *Held* further, following the judgment of Palles C.B. in *The Attorney-General v. Cummins* ([1906] 1 I.R. 406) that the forfeiture clause was not void as infringing the rule against perpetuities. And *Held* that there was no repugnancy between the grant of the lands

LANDLORD AND TENANT (1)—LEASE—FORFEITURE—Breach of Covenant—Notice—Conveyancing and Law

and the avoidance of that grant when the manse ceased to be used as a manse *In re Macleay* (L.R. 20 Eq. 186), and *In re Lunham's Estate* (I.R. 5 Eq. 170) distinguished. *Walsh v. Wightman*.

[App. 1]

LANDLORD AND TENANT (2)—LEASE FOR LIVES AND YEARS—Term of years, whether concurrent or reversionary. A sub-lease made on the 27th April, 1869, demised certain lands from its date for the life of the surviving cestui qui vie named in the head lease of the 1st April, 1812, "and for and during the term of 61 years." *Held*, by Wilson J. on a summons brought under the Vendor and Purchaser Act, 1874, that the term of 61 years was reversionary and not concurrent, and that it began to run on the 27th day of February, 1895, when the cestui qui vie died. *Adams v. M'Goldrick*.

[Ch.D. 127]

LOCAL GOVERNMENT — PUBLIC BUILDING—Work executed in contravention of by-law—Failure of urban authority to signify disapproval—Completion of building—Continuing offence—Public Health (Ireland) Act, 1878, 41 & 42 Vict., c. 52, s. 42, s. 250. The defendant H. was charged with erecting a building which in several respects contravened by-laws made pursuant to the provisions of the Public Health (Ireland) Act, 1878, by the Urban District Council of Portstewart. The defendant lodged plans with the Council for approval, but commenced to build before the month limited in section 42 of the Act had expired. No notice of disapproval was served by the Council. The defendant was prosecuted before the magistrates; the summonses did not allege a continuing offence. She was convicted and fined. On appeal the Recorder of Londonderry confirmed the conviction, but altered the penalty into one for a continuing offence. *Held*, by the Divisional Court (Moore L.C.J. and Brown J.) on a Case Stated by the Recorder of Londonderry: (1) that the offence was committed only when the entire building was completed; (2) that the contravention of the by-laws was a continuing offence, and accordingly that though the Urban Council had not signified disapproval within one month from the time when the matter of complaint arose, they were not precluded from suing for penalties; (3)

that inasmuch as the defendant had only been charged with the erection of a building, penalties for a continuing offence could not be imposed. *Portstewart Urban District Council v. Hamill*.

[K.B.D. 181]

MOTOR VEHICLES (1)—HACKNEY CARRIAGE—Licence—Seating accommodation—Carrying more passengers than vehicle licensed to carry—Roads Act, 1920 (10 & 11 Geo. 5, c. 72) section 11 (2). A motor omnibus, the property of the defendants, was licensed to carry twenty passengers, but on the occasion in respect of which the complain was made there were thirty-six passengers on board, "and they were seated on the seats in the bus, so far as the seats went, and the remaining passengers were seated on each others' knees and anywhere else they could get." There was a driver and a conductor in the bus. Subsequently the conductor was prosecuted under section 11 (1) of the Summary Jurisdiction (Ireland) Act, 1851 (14 & 15 Vict., c. 92) for "carrying passengers for hire more than the number for whom seats shall be respectively provided," and was convicted and fined. At the date of this conviction the Motor Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926 (16 & 17 Geo. 5, c. 31) was not in force, but by that statute section 11 (1) of the Summary Jurisdiction (Ireland) Act, 1851, was repealed, though a corresponding offence was created by 13 (1). The complaint was brought under the Roads Act, 1920 (10 & 11 Geo. 5, c. 72, section 11 (2), which provides that "where a licence has been taken out in respect of any vehicle at the rate of duty appropriate to a hackney carriage seating not more than a certain number of persons, the person keeping the vehicle shall, if it is used on any occasion for the purpose of seating more persons than the number authorized, be liable to an excise penalty . . ." The justices found that twenty seats, was the maximum number that the bus could seat; that there was no evidence to show that more than twenty people were accommodated with seats; that the proper licence duty had been paid for a vehicle which seated twenty passengers, and dismissed the complaint. *Held*, by the King's Bench Division (Moore L.C.J. and Brown J.) that as the extra passengers were not received for the pur-

pose of seating them, the justices were right in their determination. *Moffat v. Six County Motors Limited.*

[K.B.D. 218]

MOTOR VEHICLES (2) — SPEED DANGEROUS TO THE PUBLIC—Licence—Indorsement—Discretion of Justices—Motor Vehicles (Traffic and Regulation) Act, 1926 (16 & 17 Geo. 5, N.I., c. 31). The defendant was prosecuted for driving a motor car at a speed which was dangerous to the public, contrary to the provisions of section 1 (1) of the Motor Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926 (16 & 17 Geo. 5, c. 31). The justices convicted the defendant. They were asked not to indorse the particulars of the conviction on his licence, but as they were of opinion that the third paragraph of the proviso to section 4 (1) gave them no discretion, they ordered the particulars to be indorsed on the defendant's licence. *Held* by the King's Bench Division (Moore L.C.J. and Brown J.) that it was not imperative on the justices in the case of a first conviction under s. 1 (1) of the Motor Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926, to indorse the licence. *Campbell v. Strachan.*

[K.B.D. 226]

POOR RATE—EXEMPTION—EXCLUSIVE CHARITABLE USER — Church Hall used partly for recreational purposes—15 & 16 Vict., c. 63, s. 16—17 & 18 Vict., c. 8, s. 2. The respondents were owners of a church hall which was used for church purposes, including the meetings of a guild connected with the church. Among other activities of the guild, badminton was played by the members twice a week six months in the year. The Commissioner of Valuation for Northern Ireland decided that owing to this user the hall was not entitled to exemption from rating under the Valuation Acts as it was not "used exclusively for charitable purposes." The respondents appealed to the Recorder of Belfast who held that there was an exclusive charitable user of the premises which were therefore exempt from rating. *Held*, by the Divisional Court (Moore L.C.J. and Brown J.), on Case Stated by the Recorder pursuant to the Valuation (Ireland) Act, 23 & 24 Vict., c. 4, sect. 10, that the playing of badminton in the hall formed a minor incident intended to assist the work of the church, and that

the provision of facilities for this form of recreation, forming as it did part of the charitable scheme of the church, did not deprive the building of exemption from rating. *Commissioners of Valuation v. Trustees of Fisherwick Church.*

[K.B.D. 76]

ROADS — EXTRAORDINARY TRAFFIC — Injury—Alternative methods of repair — Reconstruction—Betterment—"Necessary Expenses"—Public Roads (Ireland) Act, 1 & 2 Geo. 5, ch. 45, s. 1 (1). The defendant conveyed large quantities of building material along certain roads which the plaintiffs were obliged by statute to keep in repair. The plaintiffs sought to recover £4,625, the amount expended by them in repairing the damage caused, as they alleged, by the extraordinary traffic of the defendant. At the trial before Moore L.C.J. three bases of compensation were suggested: first, the sum of £4,625 actually expended by the plaintiffs in substituting tar macadam roads for what had previously been well-worn water bound macadam; second, the sum of £2,000 the cost of resurfacing the roads with water bound macadam; third, a sum of £175 to £225, the cost of darning and patching the roads so as to leave them in the actual condition in which they were before the extraordinary traffic began. The judge excluded the first basis from the consideration of the jury. The jury found that damage to the roads had been caused by the extraordinary traffic of the defendant and awarded the plaintiffs £300. The plaintiffs moved for a new trial on the ground of misdirection by the learned judge in telling the jury that they could only award a sum sufficient to put the roads into the same condition as they were in when the defendant's excessive traffic began, and because he did not tell them that, if the works carried out by the plaintiffs became necessary by reason of the excessive traffic of the defendant, the plaintiffs were entitled to recover the full expenses thereby incurred, and upon the further ground that the damages were inadequate and the trial unsatisfactory. The defendant did not challenge the answer of the jury in regard to liability. *Held*, by the Court of Appeal (Andrews and Best L.J.J.) that it is not the total sum actually spent on repair that is recoverable by the road authority, whether that repair involves reconstruction or not. *Regard must be had to all the*

circumstances of the case : the state of the roads when the extraordinary traffic commenced : its general character and suitability for the traffic reasonably to be expected thereon : the amount of ordinary traffic whether of the defendant or other persons, and the extent and nature of the repairs reasonably required. Deductions should also be made if roads when repaired are in a better condition than before extraordinary traffic commenced. *Down County Council v. Stewart*.

[APP. 49]

SETTLEMENT—CONSTRUCTION

—REAL ESTATE—“*Statute for the distribution of the estates of intestate persons*”—22 Car. 2, c. 10. A.S. conveyed and assigned her real estate to trustees, their heirs and assigns for ever and also a mortgage debt and securities to the trustees, their heirs, executors, administrators and assigns upon various trusts. The ultimate trust (which in the events which happened came into force) was : “Upon trust to transfer or pay the same to the next-of-kin of the said A.S. in the same way as if she had died absolutely possessed of the trust premises intestate and without having been married.” Throughout the trust deed, the realty and the personalty were treated as one unit. On a summons raising the question whether the heir at law or the statutory next-of-kin of the settlor became entitled to the real estate of the settlor—*Held*, by the Court of Appeal (Andrews and Best L.J.J.), affirming the judgment of Wilson J., that the next-of-kin were entitled. *Maclean and Graham v. Smith and Mackintosh*. [APP. 109]

STATUTORY POWERS AND DUTIES—ABSENCE OF NEGLIGENCE IN EXERCISE OF—

Danger caused by act of Nature—Illegal abatement of nuisance by person injured. The appellants were created a company under an Act of 1843 (6 & 7 Vict. c. civ.) which vested in them the property right and liabilities in a navigable canal from Belfast to Lough Neagh. In 1912 the appellants raised a coping round one of the locks on this canal and the banks behind it, to prevent flood water from flowing over the sides of the lock and interfering with the navigation of the canal. The respondents alleged that the appellants had thereby unlawfully penned back flood water on the respondents’ lands. In January, 1924, there was a heavy flood in the

river and canal, and the respondents without previous notice cut away portion of the banks to allow flood water to run away. Wilson J. granted an injunction to restrain the respondents from interference with the appellants’ banks and damages fixed at £20 in lieu of an inquiry. The Court of Appeal (Moore L.C.J. and Andrews L.J.) reversed the judgment of Wilson J. holding that the acts complained of were lawful and justified in order to abate an active nuisance. The House of Lords reversed the judgment of the Court of Appeal and restored the judgment of Wilson J. holding that there was no evidence to establish that the appellants were guilty of negligence in the exercise of their statutory powers or that they had done any wrongful act or been guilty of creating a nuisance; that the respondents had not proved that they had not done unnecessary damage nor that there was not an alternative method, other than the cutting of the banks, to reduce successfully the flooding of their lands. *Geddis v. The Bann Reservoir* (3 A.C. 20) and *Bligh v. The Rathangan River Drainage District Board* ([1898] 2 I.R. 205) distinguished. *Lagan Navigation Company v. Lambeg Bleaching, Dyeing and Finishing Company*.

[H.L. 24]

THEATRE—EXCISE LICENCE—

Excise Act, 1835 (5 & 6 Will. IV., c. 39), s. 7—*Intoxicating Liquor Act (Northern Ireland)*, 1923 (13 & 14 Geo. 5, c. 12) s. 9. Justices of the Peace have power to grant a theatre licence to perform plays, etc., under the implied authority contained in 5 & 6 Will. 4, c. 39, s. 7. A licence for the sale of intoxicating liquor, granted in pursuance of that section, is not a licence within the meaning of the Intoxicating Liquor Act (N.I.), 1923. *Morrison and Bradlaw v. Commissioners of Finance*.

[K.B.D. 115]

TOLLS—MARKET—SALE OF VEGETABLES WITHIN THE CITY OF LONDON—

Derry—Londonderry Corporation Act, 1918 (8 & 9 Geo. 5 cxxi) s. 239—*Market and Fairs Clauses Act, 1847* (10 & 11 Vict. c. 14) s. 13)—*Londonderry Improvement Act, 1848* (11 & 12 Vict. c. xli)—*Londonderry Improvement Act, 1896* (59 & 60 Vict. c. ccxlix)—*Certiorari*. By a local Londonderry Improvement Act, 1848, incorporating the Market and Fairs Clauses Act, 1847, the Corporation was authorized

to levy tolls on, among other things, vegetables exposed for sale in their markets. In the year 1896 a further local Act was passed authorizing further tolls supplementary to those contained in the Act of 1848, and in 1918 the Londonderry Act of that year was passed which enabled the Corporation (s. 239) to demand and receive for the use of their markets such charges, etc., as might be prescribed by the Local Government Board, and any charges so prescribed were substituted for the charges specified in schedule D of the Act of 1848 and schedule B of the Act of 1896. David Murray was convicted at the Petty Sessions of Londonderry, on a complaint that he did at Bishop Street and Lecky Road on 9th March, 1926, sell and expose for sale articles to wit vegetables in respect of which tolls are by the Londonderry Improvement Act of 1848 authorized to be taken in the complainant's market, otherwise than in his own dwelling place or shop, he not being a licensed hawk. The respondent appealed to the Recorder of Londonderry who made an order to amend the summons and conviction (if necessary) by substituting the Public Health (Ireland) Act, 1878, for the Londonderry Improvement Act, 1848, and being of opinion that section 13 of the Market and Fairs Clauses Act, 1847, still applied to the Londonderry markets affirmed the conviction. The respondent obtained a conditional order for certiorari to bring up and quash the conviction. *Held* (by the Divisional Court), that no amendment of the conviction was necessary, and that the conditional order not having been granted on the ground of uncertainty, this point was not open to the respondent; And *held* that the conviction was right; the Londonderry Improve-

ment Act of 1848 being still in force, and publication of the lists of tollable articles and confirmation by the Local Government Board having been proved, it was immaterial whether the tolls were described as made under the Act of 1918 or under the Act of 1848. All that the Act of 1918 did was to substitute a new list of tolls for tollable articles for that theretofore in force. *Rez (Murray) v. The Recorder of Londonderry.*

[K.B.D. 118]

WATER RIGHTS — DIVERSION OF RIVER'S COURSE—RIPARIAN OWNERS—Encroachment on river's bed—Obstruction — Flooding — Injuria sine damno. The defendant H. was sued for damages for diverting the course of a river between his lands and the lands of the plaintiff T., for having so encroached on the bed of the river that the plaintiff's river banks were being injured and destroyed, and for having so impeded or interrupted the free flow of the waters of the river, that the plaintiff's lands were rendered subject to flooding and other damage. The Recorder of Londonderry gave the plaintiff a decree for sixpence in a Civil Bill under the Title Jurisdiction. On appeal Moore L.C.J. found as a fact that there was no trespass, no obstruction, no diversion, and no damage by the defendant, but stated a case for the opinion of the Court of Appeal. *Held*, by the Court of Appeal (Andrews and Best L.J.J.), that on the findings of fact contained in the Case Stated the plaintiff was not entitled to a decree for any damages. *Thompson v. Horner.* 191

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